No. 13041

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEVE CHORAK, *et al.*,

Appellants,

vs.

RKO RADIO PICTURES, INC., *et al.*,

Appellees.

BRIEF OF RESPONDENTS.

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BRIEF OF RESPONDENTS.

Preliminary Statement.

In this case the District Court found as follows:

1. That appellant's theatre at Puente is in substantial competition with the Valley, El Monte and Tumbleweed Theatres (all in the El Monte area) and is not in substantial competition with any of the other theatres mentioned in the complaint. [F. F. IV, R. 140.]

2. That a grant of a reasonable clearance affords a fair protection to the interest of the licensee in the run granted without unreasonably interfering with the interest of the public, and is essential in the reasonable conduct of the business of distributing and exhibiting motion pictures. [F. F. VI, R. 143.]

3. That the availability established by each defendant distributing company for the Puente Theatre and the clearance granted by each distributor company to the

theatres in substantial competition with appellant's theatre was reasonable and was established by each distributor independently and without any contract, agreement, combination, conspiracy, or understanding, either express or implied. [F. F. VI, R. 147.]

4. That the general policy of defendant Sanborn in showing in his El Monte Theatre feature pictures distributed by the defendants Warner's, Loew's, Fox, Paramount and Universal and of defendant Edwards in exhibiting in his Tumbleweed and Valley Theatres the feature pictures of defendants Columbia, RKO, Monogram and Republic was not established as the result of any agreement, plan or conspiracy between themselves or with others. [F. F. VI, R. 149.]

5. That the exhibitor defendants do not have nor have they exercised any mass purchasing power in the rental of feature pictures exhibited in the area involved. [F. F. VI, R. 150, F. F. IX, R. 152.]

6. That none of the defendants has engaged in any combination or conspiracy to restrain or monopolize interstate trade or commerce in the distribution or exhibition of motion picture films within the area concerned in this action and that none of the defendants has, in fact, monopolized or restrained said trade or commerce. [F. F. VIII, R. 151.]

7. That none of the defendants has established or maintained in the competitive area an arbitrary, uniform or unreasonable system of runs or clearances; that appellant has not been improperly excluded from obtaining

motion picture films for exhibition; that none of the distributors has discriminated against the appellant, and that none of the distributor defendants has fixed the minimum admission prices which appellant has charged, but that such admission prices were fixed by appellant in his own uncontrolled discretion. [F. F. IX, R. 152-153.]

8. That appellant has not been damaged by the acts of defendants. [F. F. XI, R. 153.]

Under the rules controlling federal appellate courts the foregoing findings of fact are conclusive unless "clearly erroneous." (F. R. C. P. Rule 52; *United States v. Yellow Cab Co.* (1949), 338 U. S. 338, 342.)

In effect, it is the contention of appellant that *as a matter of law,* and upon the record, this court must find the facts to be, in each instance, the exact opposite from those found below, for only otherwise can the judgment be reversed. On the other hand, it is the contention of the respondents that each of said findings and the decision based thereon are fully supported by the evidence, and the reasonable inferences to be drawn from the evidence and that the most that can even be claimed in any instance is the existence of a conflict in the evidence, which, in this case, was resolved against the appellant in favor of the respondents. In short, the issues presented by this appeal are whether the evidence supports the basic conclusions of the trial court that there was no conspiracy and that the clearances granted were not unreasonable. A determination of those issues in favor of the respondents would appear to dispose of the matter.

Statement of Facts.

The impression of this case which might be gathered from a reading of appellant's opening brief is so very different from the facts as developed in the record and found by the court as to make the case presented by him hardly recognizable as the one which was actually tried. Under the guise of stating facts, evidence or findings the appellant has utilized the devices of misstatement, omission, invective and argument to paint an entirely erroneous picture.* We are, therefore, compelled to state the facts as shown by the record and found by the court in much greater detail than would otherwise be necessary.

The area of Los Angeles County generally known as the San Gabriel Valley is located adjacent to and just north and east of the City of Los Angeles. The Valley is approximately 10 miles in width and extends east from Pasadena, Alhambra and Monterey Park to the San Jose Hills a little west of Pomona. Two federal arterial highways cross the area from west to east. The northernmost of these is Foothill Boulevard (Federal Highway 66) which runs from Pasadena through Azusa to San Bernardino. The southernmost is Garvey Boulevard (Federal Highway 99) running from Los Angeles through Monterey Park to Pomona and thence through Riverside to Blythe and the Imperial Valley. Between

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*See *e. g.*, the seven "facts" on pages 13 to 15 of the Brief, which appellant says "the above testimony clearly establishes without substantial dispute," and the eight more at pages 36 to 37 which he declares "the evidence shows and the court found."

The errors of fact in appellant's Brief are so numerous that they cannot be corrected within the body of our brief. We have listed the most salient ones in Appendix, Part A attached.

these two highways, Valley Boulevard runs easterly through the cities of Alhambra and El Monte. Just east of the city limits of El Monte it crosses Garvey and swings far to the south between the San Jose and Puente Hills and then north again to rejoin Garvey Boulevard just west of Pomona. A number of years ago Valley Boulevard was the main highway between Los Angeles and Pomona, but with the construction of Garvey as a new, direct, and short arterial route, Valley Boulevard, east of El Monte, has become a purely secondary road. [Exs. 1, A; R. T. 657, 748.]

The City of El Monte is located approximately in the center of the southern part of the San Gabriel Valley about 6 miles east of Alhambra. It is, as the court found, an important trading and business center for a large segment of the Valley including the community of Puente. [F. F. VI, R. T. 148.] While its incorporated limits are small, it and its environs (including the immediately adjacent intersection of Garvey and Valley Boulevards, known as "Five Points") lie at the eastern end of a highly congested area. In the area from El Monte west to Alhambra there were in October, 1948, approximately 180,000 people. [Ex. 2, Areas 12, 28.1 to 28.3, 28.6; see map on reverse side.] Many of the theatres named in the complaint or discussed in appellant's brief, such as the Rosemead, Garvey, Monterey Park and Temple City Theatres, lie in this congested area *west* of El Monte.

Almost immediately after Valley Boulevard leaves the Five Points intersection on its circuitous eastern route between the San Jose Hills on the north and the Puente Hills on the south the nature of the area changes. It becomes almost entirely rural with scattered farms and dwellings. [R. T. 748, 1621.] The evidence shows that in the so-

called "Puente Hills" area, as defined by the Regional Planning Commission of the County of Los Angeles and which extends from the Five Points intersection almost to the City of Pomona, a distance of approximately 15 miles and about one-half of that distance north and south, there were only 15,954 inhabitants at the time of the trial. [Ex. 2.] In fact the map on Exhibit 2 shows that although the so-called "Puente Hills" area is one of the largest, if not the largest, of the 35 Regional Planning Commission areas in the County of Los Angeles, it has less inhabitants than any other such area except the five isolated areas of Catalina Island, Calabasas, Malibu, Chatsworth and the mountain terrain north of Santa Monica.

The little rural community of Puente is located on Valley Boulevard approximately five miles southeast of the Five Points intersection. It is an unincorporated settlement in which, as the court found and appellant conceded [F. F. VI, R. 148; R. T. 10, 34] approximately 43% of the residents within a one-mile radius are Spanish speaking. The entire population within such radius consists only of 2,190 [Ex. A] as compared with a population within the same radius of the Five Points intersection of 12,804 [Ex. A], a population within the corporate limits of the City of El Monte of 7,702, and a population in the Planning Commission "El Monte Area" of 61,348 [Exs. A and 2]. El Monte is a city with a completely urban character; Puente is a small rural town with no elaborate business section or substantial business construction. [R. T. 466, 619; Or. Op. 12-13.] In fact, as the court observed in its oral opinion, the appellant's theatre "is now the principal building of the community." [Or. Op. 12.] When it is noted that this building only

cost $75,000 [Ex. AA] the character of the community becomes fairly obvious.

Each of the distributors follows the same general pattern in the distribution of its pictures in the San Gabriel Valley area. Each distributor seeks and usually secures a first run for its pictures in one or more of the deluxe theatres in Los Angeles with its usual accompaniment of advertising and publicity. Seven days from the close of exhibition in Los Angeles each particular picture is usually exhibited in one or more of the theatres in Pasadena simultaneously with its exhibition in other similar suburban communities such as Glendale, Inglewood and Huntington Park. Following the normal method of distribution, which provides for succession in exhibition from the larger area to the smaller, most of the distributors seek exhibition in theatres in Alhambra 7 days after the picture closes in Pasadena. [R. T. 1401, *et seq.,* 1451-55; Ex. PP.] The theatres between El Monte and Alhambra generally receive availabilities from each distributor based upon the close of the picture in Alhambra. The three theatres in the El Monte-Five Points area have an availability of 14 days after Pasadena closing, which availability is ordinarily behind Alhambra but ahead of the theatres "keying off" of Alhambra. [Ex. Z.]

The respondent Sanborn was the pioneer exhibitor in El Monte, having commenced his career as an exhibitor there in 1922. He first owned what is now the Valley Theatre and about 1939 built the El Monte Theatre which the evidence showed and the court found to be the largest and finest of the four theatres directly concerned in this litigation. [R. T. 109; Or. Op. 13; F. F. VI, R. 148.] Approximately at the same time respondent Edwards entered the El Monte area by the erection of the Tumble-

weed Theatre at the Five Points intersection. [R. T. 66.] This theatre with a seating capacity of 737 is also a fine modern theatre.* About a year later Edwards was able to induce the landlord of the Valley Theatre to give him the lease on that house instead of Sanborn [R. T. 66, 738] and since that date has been operating both the Tumbleweed and Valley Theatres in the El Monte area.

During the period when Sanborn operated both the El Monte and Valley Theatres, he operated each theatre on a "first run El Monte" basis, utilizing the product of all of the distributors named excepting RKO, Republic and Monogram. [R. T. 738, 750, 1771-75.] When the Tumbleweed Theatre opened, Edwards demanded the right to play such pictures on an availability of 7 days following their exhibition in Sanborn's theatres, and when such right was refused, brought an arbitration proceeding under the provisions of the consent decree theretofore entered in 1940 in the case of *United States v. Paramount Pictures, Inc.* In that proceeding to which Edwards, Sanborn and the major distributors were parties and which was binding upon them under the terms of that decree, it was held that Sanborn's El Monte Theatre was entitled

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*It is most important to note that the Tumbleweed, while located just outside the incorporated city limits, is for all intents and purposes an "El Monte theatre" [R. T. 107-8] and was so treated at the trial. [R. T. 76, 107-9, 303, 369, 759-60, 796, 1783.] As the court said: "It is part of El Monte. The Tumbleweed Theatre is right at the edge of town. It might be outside the city limits if you want to draw an imaginary line there, but it is all a part of that community." [R. T. 796; Or. Op. 12.] It is so treated in the findings. [F. F. IV, R. 140; VI, R. 148, 149, 150.]

Appellant's Brief practically ignores the larger, newer, more modern, and closer Tumbleweed, and directs attention only to the little Valley Theatre. (App. Br. 10, 11, 12, 17, 18, 21, 22, 27, 28, 29, 33, 34, 36, 64.) It is thus most misleading.

to a clearance of 28 days over the Tumbleweed on pictures purchased by Sanborn. [R. T. 751, 1175-78, 1706; Arb. Bd. Appeals Dec. No. 55.] As a result Edwards was faced with either playing 28 days behind Sanborn or playing "first run El Monte" upon such pictures as he could secure on that basis. He chose the latter course. [R. T. 1706.] Since Sanborn's theatre was the larger and finer theatre and could hence afford to pay the most money for the pictures, Sanborn was able to retain the choice product of the larger companies of Loew's, Paramount, Fox, Warner Bros., and in addition Universal and United Artists. Edwards, on the other hand, was able to secure on an equal availability only the pictures distributed by RKO among the major companies, and the minor and weaker product of Columbia, Republic, Monogram and a number of independent companies not parties to this litigation. [R. T. 83, 108, 750, 1771-75.] When he acquired the small Valley Theatre, Edwards followed the policy generally of playing the pictures of those companies in both the Valley and Tumbleweed, the practice usually being that the picture played first in the Tumbleweed and thereafter and within a few days or a week at the most in the Valley. [R. T. 75-76; Exs. N, O. P. HH.]

In 1947 appellant, who had some experience as the operator of theatres in small communities, plus approximately 18 months as the operator of a subsequent run house in Oakland [R. T. 842-46], commenced the erection of a theatre in Puente, which village had not theretofore had any theatre. He erected a substantial and surprisingly large house with approximately 726 seats. On November 21, 1947, by registered letter he advised the vari-

ous distributors of the construction of his theatre, declaring:

> "The new Puente Theatre's relation toward other theatres in the territory will be *strictly non-competitive, because this community is composed mostly of Mexican nationals, and local farmers,** who for years clamored for their own theatre in this community.
>
> "As *my intended policy* is to show your pictures *immediately after Los Angeles first runs,* kindly mail me now your list of availabilities." [Ex. 115; R. T. 878, 1071.]

He followed up this letter with personal visits upon the various distributors seeking the playing position mentioned. [R. T. 879-934.]

Shortly thereafter both Edwards and Sanborn, apparently learning of Chorak's letter, wrote the distributors, each requesting clearance over the Puente Theatre. Sanborn, after pointing out his history in the El Monte area and the status of El Monte as the business center for the district including the Puente community, declared

> "We believe this house [Puente] to be competitive to the El Monte theatre and in consideration of film revenue derived from El Monte, together with other contributing factors, feel this ample justification for the El Monte Theatre receiving clearance over Puente." [Exs. 113, 151.]

This letter was written to those distributors licensing him in El Monte.

Edwards requested a specific clearance in favor of his "El Monte situation" of 21 days, stating:

> "In consideration of all matters concerned, such as competitiveness; distance; open country and wide,

*Italics added throughout unless otherwise noted.

paved, direct highways; respective size of the two towns, et cetera, we feel that we are more than fair toward Puente in asking for but twenty-one days' clearance." [Ex. 3.]

This letter was addressed to those companies which licensed their pictures to him in the Tumbleweed and Valley. Edwards also wrote those companies serving his theatre in Azusa in the northern part of the San Gabriel Valley (which included all of the major companies) asking that such theatre be given 21 days clearance over Puente. [Exs. 4, 114, 130.]

Each distributor was thus faced on the one hand with a demand from Chorak that he be permitted to play immediately following Los Angeles closing and ahead of every theatre in the San Gabriel Valley, including even the theatres in Pasadena and Alhambra, and on the other hand with the demands from Sanborn in El Monte and Edwards in both the El Monte area and Azusa for clearance over Puente. Each distributor individually and without consulting any other distributor made its own investigation of the situation so presented. [R. T. 176, 275, 397, 474, 1416, 1584, 1607, 1756, 1809, 1824, 1834; F. F. VI, R. 147.] This investigation included on the part of some of the distributors (*e. g.,* Loew's, Paramount, Fox) personal field examinations of the area and theatres by top local and divisional executives. [R. T. 443, 527, 548, 673, 1606, 1617, 1812, 1821.] In other instances such investigations were made by salesmen. [R. T. 212, 268, 351, 619.] Each distributor individually concluded (as did the court itself) that under all the physical conditions then existing, and applying the legal criteria set forth in the then decision of the Expediting Court in *United States v. Paramount Pictures, Inc.,* 66

Fed. Supp. 323, 341-343 (which had been rendered more than a year prior thereto), the Puente Theatre was in direct and substantial competition with the theatres in the El Monte area* and that the latter were entitled to priority of run and clearance over Puente. [R. T. 268, 352, 409, 466, 527-28, 549-50, 1414-16, 1491-94, 1608, 1822.]

The clearances and availabilities determined upon by the different distributors were varied.** [Ex. Z.] Warner Bros. established an availability for Puente of 21 days after Pasadena closing; Loew's, Universal, Republic and RKO gave 14 days after the conclusion of the exhibition of their respective pictures in the El Monte area. United Artists and Monogram gave 14 days after El Monte or 35 days after Pasadena whichever was the earlier. Paramount originally established an availability of 14 days after El Monte [R. T. 442-45, 466, 482] but within a month, and in view of an exceptionally fine showing by Puente on the picture "Roar to Rio,"*** re-

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*Appellant conceded that in spite of his letter of November 21, 1947, he was in substantial competition with the El Monte area theatres. [Compl. R. 14, 23 *et seq.;* R. T. 1036, 1156.]

**There is a technical difference between the word "availability" and the word "clearance." The word "availability" means the earliest date on which a picture may be exhibited in a particular theatre and is usually specified as a certain number of days after some other theatre or area. "Clearance" is the period established by agreement between a distributor and a prior exhibitor as the time which must elapse after the conclusion of exhibition before the picture may be played in another specific theatre or area. Thus the El Monte Theatre had an "availability" of 14 days after Pasadena and the Pasadena exhibitor who played a particular picture ordinarily had a contractual "clearance" of 14 days over El Monte.

***This picture, which played within a month of the theatre's opening, grossed more in Puente than all except two of the English language pictures which played in that theatre during the entire period up to the time of trial, including a number of pictures which Puente played *ahead* of the El Monte area theatres. [See Appendix, Part C.]

duced its clearance to 7 days after El Monte. [R. T. 438-41.]

The Fox district manager determined from his investigation that the proper availability should be 14 days after El Monte, but agreed to establish an experimental availability of 7 days. [R. T. 1606, 1610.] On the first picture played, "Daisy Kenyon," Puente grossed only $247.90 and returned to the film company only $61.97 as rental. [Ex. X.] The second picture, "Captain From Castile," grossed slightly over $300 in Puente and returned film rental of $129.91, as compared with a gross of $1,092 in El Monte and a film rental of $454.40. [Ex. X.] After this experience with Puente's potential, Fox lengthened its availability from 7 days to 14 days after El Monte. [R. T. 1613.] The Columbia executive originally determined that an availability of 21 days after El Monte would be reasonable. Chorak, however, refused to buy pictures from that company on that availability, and Columbia was forced in order to meet competition to shorten the availability to 14 days after the El Monte theatres. [R. T. 269-70, 295-96.]

The evidence was uncontradicted that each distributor established its availability and clearance independently in the exercise of its own business judgment and without agreement or consultation with any other, and without knowledge of the actions of other distributors except as might come from appellant's own statement. [See Record references above.] The court so found. [F. F. VI, R. 147.] With respect to admission prices appellant testified

that he established them after an investigation of what other theatres were charging in the area [R. T. 1248] and that no distributor ever told him what he could or should charge. [R. T. 1247, 1306, 1309, 1311, 1314, 1315.] The price so established was the same as that charged by the Tumbleweed and the Valley but approximately 10¢ less than that charged by the El Monte Theatre. [Ex. Z.]

Appellant commenced operation of his theatre on February 20, 1948. His general policy of operation, after a few weeks of preliminary experimentation, was established at four changes a week, each with a double bill. He reserved Tuesdays for an all-Spanish program with pictures procured from the two Spanish companies which were originally made parties to the litigation and then dismissed. On Saturday he exhibited "action" or "Western" pictures, coupled with a "give away," obtaining the pictures usually from Columbia, Republic or Monogram. On his Sunday-Monday and Wednesday-Thursday-Friday changes he generally exhibited pictures of the major distributors as first on the double bill and those of Columbia, Republic and Monogram as the "fillers." [R. T. 1253-56, 1221; Ex. DD.] He thus purchased substantially all of the important pictures of the major distributors and such of the product of the other distributors as he desired for his Saturday programs and as secondary fill-ins. The evidence showed that up to March 31, 1949, he had made a profit of $7,000 after paying approximately $4,000 in interest on loans for his building and equipment and deducting approximately $7,000 for depreciation

and amortization. [Ex. BB.] He admitted, and the evidence showed, that he was enjoying an increasing income [R. T. 1042; Ex. BB], although generally the box office in the area was in a slump. [R. T. 765, 766, 1768.]

The foregoing presents the basic facts appearing in the record and upon which the court made its finding that there was no conspiracy and no violation of the anti-trust laws. They are without substantial contradiction in the record. During the course of this brief we shall have occasion to comment further upon particular evidentiary matters upon which appellant relies to overcome the effect of those facts.

At the close of the evidence the court requested briefs. Two very voluminous briefs were filed by each side analyzing the evidence, presenting computations and arguing legal matters, followed by written answers to specific questions propounded by the court. On October 20, 1949, the court gave its oral opinion, determining that respondents should have judgment, and giving reasons therefore. The findings were not finally settled until May 15, 1950. [R. 132.] On May 24, 1950, appellant moved for a new trial [R. 160] which motion was argued and briefed in detail. Before it could be determined, appellant moved on November 14, 1950, to supplement his motion. [R. 174.] The supplemental motion was again fully briefed, and both motions denied on February 21, 1950. [R. 190.] The trial court thus had before it a full and complete discussion of the evidence and the arguments presented on this appeal.

The Economics of the Industry Involved.*

Since this case involves an industry with peculiar economic problems dictating an unusual method of "selling" its product, the evidence has to be viewed in the light of those problems. Before discussing the specific points involved in the appeal, therefore, we desire to call attention to the background against which the evidence must be evaluated.

The ordinary first-rate feature motion picture will have a negative cost of from $750,000 to $4,000,000, to which must be added the cost of prints, advertising and distribution.** There are about 17,000 theatres in the United States, of which a major distributor may hope to service from 12,000 to 14,000 on a top picture. [R. T. 1396.] Assuming 12,000 are licensed to exhibit a picture with a $2,000,000 negative cost, the average return per theatre must be approximately $285 in order for the picture to break even.*** These theatres are of all sizes and in all locations. They charge admission prices ranging from 10¢ to 15¢ to several dollars per ticket. They cater to differing economic and social masses of patrons. Most of them, as the evidence shows [R. T. 1440] do not

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*The material in this section was the subject of testimony by various distributor executives, especially that of Mr. Smith, the Paramount division manager. [R. T. 1393-1413, 1417-22, 1430, 1439-49, 1453-56, 1491-96, 1507-12.] See also testimony of Mr. Stoner, district sales manager for Fox. [R. T. 1600-59, esp. 1628, *et seq.*]

**Advertising and distribution is estimated at about 70% of negative cost.

***This is without regard to cost of printing from the negative, which for a black and white picture, is from $200 up per print, and for a color picture is from $600 up per print. [R. T. 1439.]

and cannot pay anywhere near the average amount necessary to bring back costs, much less make any profit.

These indisputable economic facts, unique to this industry, make essential the system of successive exhibitions or "runs" and as a corollary the existence of the lapse of time between "runs" in an area of competition, or "clearance." This system is not only for the benefit of the distributors but equally, if not more so, for the benefit of the exhibitors. It is of benefit to the public as well because it permits every person to see the picture at such theatre and such price as suits his convenience and pocketbook.

We do not believe that we need to do more than sketch the essentiality of this method of distribution as far as the distributor is concerned. Where a print alone costs a minimum of $200 and has a life of 50 or 60 "runs," it would be impossibly extravagant to make 12,000 prints, each to be used once and thrown away.* Furthermore, the distributor's object is to have as many people as possible see each particular picture distributed by him. His ideal would be to have his picture seen by every person of motion picture age in the United States. To come anywhere near such ideal the picture must have an extended exhibition life. If every exhibitor showed the picture at approximately the same time, its life would be, at the most, a week or two, and great numbers of patrons would be lost because it might not be convenient for them to see the picture during the particular period. The distributors would also lose the benefit of the advertising build-ups, including word-of-mouth advertising, which is

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*Actually, a distributor makes from 200 to 300 positive prints per picture. [R. T. 1439.]

important in the case of every successful picture. [R. T. 1439-42.]

Even more important, however, is the fact that the distributor cannot secure the same amount for the exhibition of the picture from each of the 12,000 theatres he might serve because most of them simply cannot afford to pay their average share of those costs.* Therefore, he must charge some theatres substantially *more* than such average for the same picture which he delivers to other theatres at substantially *less*. In order to get many times more from one customer for the same identical picture than he can secure from another and competing exhibitor, the distributor obviously has to offer something in return. This fact makes the system of successive "runs" and "clearances" of vital importance to the exhibitor.

For it must be remembered that just as the distributor has nothing tangible to sell, neither has the exhibitor. Here is a business in which the customer invariably comes out of the establishment, not with something he can see or touch or show, but with less by the amount of admission price than he had when he went in. He receives only entertainment—mental and emotional stimulation to a greater or less degree. That stimulation is not greatly affected by *where* or *when* he sees the picture. He hears and sees exactly the same thing whether it be in the most expensive, deluxe metropolitan theatre or the cheapest "grind house" or tiny rural hall.

The element which the distributor has to offer and each exhibitor strives to acquire is an advantage in the

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*It was testified that approximately half the accounts sold pay less than $50 for the license of the very top pictures. [R. T. 1440.]

timeliness of the exhibition—the appeal to the curiosity and the pride of the movie fan. Such curiosity is aroused by previous pictures made by the same studio, the type of picture in question, the "star" system, the barrage of publicity, exploitation and advertising, the movie columns and fan magazines and radio movie gossipers. The movie goer wants to see the picture first and then to talk about it to others. To the varying degrees in which these emotions are aroused in particular individuals and on particular pictures, there is an equivalent variation in the number of times the patron will attend, the distance he will travel and the price he will pay.

That is why some exhibitors will always pay more for the right to exhibit identically the same picture in a particular area than will other exhibitors. They buy the right to exhibit *first,* ahead of their competitors and the right to have sufficient time lapse before the competitor exhibits so as to capitalize on the curiosity and pride of the patrons. The right to *show* the picture is open to everyone. There is no claim here that Mr. Chorak was denied a license for any particular picture. But what the distributors are really selling and what the exhibitors are really buying is a particular position in the sequence of exhibitions in a competitive area—the "run"—with an adequate "clearance" period to guarantee that what has been bought and paid for will not be dissipated. As the witness Taylor put it clearly, "The only thing we have to sell in this business is clearance." [R. 513.] Mr. Taylor exaggerated, but he pointed up an essential truth.

Since therefore *the competition between the exhibitors with respect to any picture is not for the picture itself,* which each can and does get if he wants it, *but for the right to give the earlier exhibition of it*—a prior run with

reasonable clearance—the exhibitor whose position gives him the greatest potentiality of box office earnings and who is willing to offer license fees, based upon such potentiality, which under all circumstances will return the most revenue from the area will generally be able to buy such right over his competitors.*

There are various elements which in the aggregate determine the theatre with the highest grossing potentialities. Seating capacity is important, of course. Other things being equal, the larger the house the larger the grosses. This does not mean, however, that a 3,000-seat house in the middle of the desert would be able to compete for a prior run successfully against a much smaller theatre in a congested area. Locality with respect to communities is very important. There is a perfectly natural

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*In his studied and determined refusal to recognize this basic fact lies the fundamental fallacy of appellant's entire position. He considers "competition" as being solely that of exhibitors *for the patronage of the public.* Hence, he contends that his failure to secure the run he desires makes him "non-competitive" as to the exhibitors in the El Monte area. But, as far as the distributor is concerned, the competition for *the run* is the thing with which it is involved. Once *that* competition has been determined in favor of one or another exhibitor, and the run granted, then the position of the two exhibitors between each other for patronage has been fixed *as the result of the competition for the run.* Judge Hand pointed this out clearly in the very recent case of *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2nd Cir. 1951), 190 F. 2d 951, 958:

> "In considering evidence of a conspiracy it should be kept in mind that there are a limited number of pictures available for exhibition so that *what one exhibitor gets for a given run is necessarily not available to his competitor. A distributor is, therefore, by the very act of distributing pictures, favoring some exhibitors at the expense of others.* At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed. *Thus there is nothing illegal in the mere fact that Dipson could not get all the pictures it wanted for the runs it wanted."*

and well-established tendency when people are going out for an evening's entertainment to go from the village to the town and from the town to the city. [R. T. 1493.] That tendency is of great advantage to the theatre in a larger city and increases its grossing potentialities. The same is true with respect to a more or less desirable location within the community itself. The type of theatre, its accommodations, and the services it renders have their effect, as does the "policy." The extent of appeal of the type of pictures which are generally shown in view of the type of patronage, or the way in which the exhibition program changes, or the number of pictures exhibited on a program may affect grosses. Admission price is important also. The extent to which the management is economical and efficient is an important factor.

These are ordinary elements which determine competitive advantages in *any* business and which are established and controlled by the respective exhibitors, not by the distributors. If upon a fair weighing of these elements it is clear that one exhibitor has a greater grossing potentiality and can thus afford to and will pay more than his competitor for the run and for a lapse of a reasonable time before the picture can be shown elsewhere, then he is entitled by our system of free enterprise to buy that priority and clearance, and he is also entitled, in the interest of fair competition, to get what he pays for.

It is equally vital to the distributor's interests to see that the area or theatres with the greatest grossing potentialities receive the fullest advantage of timeliness. This is true for obvious reasons where the admission prices are larger since rentals are quite generally calculated on a percentage of the gross, but it is equally true where the advantages in grossing potentiality depend upon other

factors. Unless such advantages are fortified by a commensurate earlier exhibition of the picture, the loss of timeliness will result in many patrons passing up the picture entirely, to the destruction of the potentiality itself. If the distributor is to conduct its business at a profit it must, therefore, assure itself that the areas and theatres having the greatest grossing potentialities secure the earliest runs, and a fair protection through a reasonable clearance period to the run so licensed, thus capitalizing on such potentialities and assuring the return to the distributor of the maximum revenue from the picture.

It is these economic principles which determine the method of distribution of motion pictures. Their existence, and the consequent establishment of successive runs based generally upon priority in a given area to localities and theatres having the greatest grossing potentialities with adequate clearance to protect the runs so granted, have been recognized and approved by every court without exception which has passed upon the question.

The findings of the Expediting Court in *United States v. Paramount Pictures, Inc.* (70 Fed. Supp. 53), were incorporated without substantial change as its findings in the final decree entered after remand from the Supreme Court. We quote:

> "74. The cost of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

"75. Without regard to period of clearance, licensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures.

"76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

"78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business." (70 Fed. Supp. 53, 62.)

These findings are based upon, and, in fact, taken almost word for word from an extended discussion of the subject contained in the Expediting Court's opinion in *United States v. Paramount Pictures, Inc.*, 66 Fed. Supp. 323, 341, to which we call particular attention. In that opinion the court also outlined the factors which distributors should properly take into consideration in appraising the grossing potential of a theatre. It said (pp. 343, 345):

"In determining whether any clearance complained of is unreasonable, the following factors should be

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*As modified in final decree. See 85 Fed. Supp. 897.

taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

"(1) The admission prices, as set by the exhibitors, of the theatres involved;

"(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

"(3) The policy of operation of the theatres involved, such as the showing of double features;

"(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

"(5) The extent to which the theatres involved compete with each other for patronage;

"(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

"(7) There should be no clearance between theatres not in substantial competition.

* * * * * * * *

"Much that has been said about clearance is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other."

The position of the Expediting Court in the *Paramount* case on the validity of the method of distribution by successive runs and adequate clearance was approved by the Supreme Court in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 145 (1948), and in *Schine Theatres v. U. S.*, 334 U. S. 110, 121 (1948).

In its opinion the Expediting Court pointed out that:

> "Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. Westway Theatre, Inc. v. Twentieth Century-Fox Film Corp., D. C. Md., 30 F. Supp. 830, affirmed on opinion below, 4 Cir., 113 F. 2d 932, and unreported cases therein cited; Gary Theatre Co. v. Columbia Pictures Corp., 7 Cir., 120 F. 2d 891. We find the reasoning of these cases persuasive." (66 Fed. Supp. 323, 342.)

The *Westway* case referred to by the court presented a factual situation uncannily similar to that presented by this appeal. It was a treble damage suit in which plaintiff was the owner of a new theatre in a suburban community just outside the City of Baltimore. Defendant, operator of an independent circuit of 32 theatres, one of which was located within the Baltimore city limits and about two miles from plaintiff's theatre, asked for and secured a clearance of 14 days over plaintiff from the distributors who served defendant and which included all of the major distributors, excepting RKO. The court held that there was no conspiracy among the distributors and that their actions were reasonable. In a splendid opinion, so complete and convincing that the Court of Appeals affirmed solely upon its authority (4 Cir., 113 F. 2d 932), the court carefully outlined the reasons for the system of runs and clearances, and then said:

> "First and subsequent runs of motion pictures is a practical physical necessity of the business. . . . Therefore such a provision in the contract [for clear-

> ance] is entirely consistent with the ordinary rights of ownership of property, and would seem to be entirely legal unless by combination or conspiracy or by harsh and oppressive treatment prejudicial to the public and particular individuals, the ownership of the copyright is made merely an instrumentality for the unreasonable restraint of trade or competition." (30 Fed. Supp. 834, 835.)

The *Westway* case has been cited many times and always with approval.*

In *Gary Theatre Co. v. Columbia Pictures Corporation* (7th Cir., 1941), 120 F. 2d 891, the upper court affirmed a judgment for defendants in a Sherman Act case upon the findings below. These findings included the following:

> ". . . that the copyrighted films are commonly licensed, subject to the established rules of clearance and priority, for successive runs; that, in general, license fees paid to distributors for prior runs produce greater revenue than subsequent runs in the same area; that the distributor attempts to license each successive run to such theatre as by reason of size, location, equipment, prestige, price, management and business policies is in position to earn and pay the highest fees; *that the existing practices are usual, customary and necessary for economically sound distribution and exhibition of films and beneficial both to distributor and exhibitor;*" (Pp. 893, 894.)

Since the opinions in *United States v. Paramount Pictures, Inc.* (66 Fed. Supp. 323, 334 U. S. 131), various Courts of Appeal have had before them cases where the plaintiffs' positions were almost identical with that of the

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*See citations listed in *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md. 1950), 94 Fed. Supp. 388, 395, note 2.

appellant here and where the principles above annunciated formed the basis of judgment in favor of the defendants.

In *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2 Cir., July 15, 1951), 190 F. 2d 951, the plaintiff exhibitor alleged a conspiracy among the major distributors who granted priority of run and clearance to a competitor. In the course of its opinion upholding the findings of the District Court that no conspiracy existed Judge Augustus Hand (who wrote the opinion in *U. S. v. Paramount*) said:

> "In considering evidence of a conspiracy it should be kept in mind that there are a limited number of pictures available for exhibition so that what one exhibitor gets for a given run is necessarily not available to his competitor. A distributor is, therefore, by the very act of distributing pictures, favoring some exhibitors at the expense of others." (P. 958.)

The court cited the *Westway* case as "well summarizing the process."

In *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md., 1950), 94 Fed. Supp. 388, affirmed 4th Cir. (1951), 189 F. 2d 787, plaintiff had built a new theatre in a neighborhood area of the City of Baltimore. Defendant, the owner of two theatres in the area, after unsuccessfully trying to prevent plaintiff's theatre from being built, applied for and received priority of run and clearance over the defendant from the six distributors who were sued. The District Court found that no conspiracy existed and that the actions of the defendants were reasonable under the basic economic principles above outlined. Such findings were affirmed on appeal. Both courts, in excellent opinions directly in point here, cited, discussed and relied upon the *Westway* case.

The most recent decision of which we are aware involving a treble damage suit in the motion picture industry is that of Judge Leon Yankwich in the Southern District of California, filed August 17, 1951, in the case of *Fanchon & Marco v. Paramount Pictures, Inc., et al.* (C. C. H. Tr. Reg. Rep., page 64,753.) In that case the plaintiffs were the operators of a theatre within the urban section of the City of Los Angeles. They alleged that all of the defendant distributors had joined in a conspiracy to deny them first-run privileges in the City of Los Angeles and to subject them to a clearance of 21 days in favor of first-run theatres, which clearance permitted other theatres in other communities and districts within the metropolitan area to play pictures ahead of their theatre. In a long and well considered opinion Judge Yankwich ordered judgment for the defendants. Among other excellencies the opinion contains a clear and distinct approval of the method of distribution here discussed. Judge Yankwich said:

> "The nature of the product with which motion picture distributors and exhibitors deal is such as to require the regulation of the manner of exhibition. It would be conomically unwise, even if feasible, to throw the product on the market on the same day in all the thousands of theatres in the United States, or even in a theatre-going area like Los Angeles. The average minimum number of prints for a feature picture is 280, the maximum is 400. These must serve 15,000 accounts. For the Los Angeles area, 12 prints are reserved, which number, after the 21-day play-off, is increased to 30. The minimum cost of a print is $165.00.
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> "So preference must be given to certain theatres. And to make such preference effective, the exhibition of pictures at other theatres must be limited to a

lapsed period after exhibition of the picture at first-run theatres. Because motion pictures play in units of weeks, the availability period is described in multiples of seven, there being seven, fourteen and twenty-one day periods after first runs elsewhere.

"This pattern obtains not only as between different localities, but in theatres located in the same community. And, generally, the rule in the industry has been to license motion pictures upon this basis. No cases exist which hold that the system, *in itself*, is a violation of anti-trust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preferences."* (Citing cases.)

As far as the case at bar is concerned the record clearly shows and the findings of the court clearly establish that all that was done by each distributor, acting individually and independently, was to apply to the factual situation which existed with reference to appellant's theatre and its substantial competitors the economic principles which are above outlined and which have been held not only legal, but essential in the distribution of motion pictures. The lower court found that such application was not the result of any "conspiracy" and was wholly reasonable, just as the courts found in the *Westway, Gary, Dipson, Walbrook* and *Fanchon & Marco* cases and in other cases which will be hereafter referred to. Appellant's attack here in its essence is an attack upon the laws of economics. His claim of conspiracy is based upon the simple fact that the distributors were uniform in their refusal to violate those laws.

*Italics the court's.

ARGUMENT.

I.

The Finding That There Was No Conspiracy to Restrain Trade or Commerce in Violation of the Anti-Trust Act Is Fully Supported by the Evidence.

In his opinion in *Fanchon & Marco v. Paramount Pictures, Inc., supra,* Judge Yankwich said:

> "We start with the postulate that an exhibitor does not have the right to *compel* a motion-picture producer to give him a preferred run. Of necessity, as the motion picture industry could not operate under a system of simultaneous releases, clearances and runs are not illegal *per se.* And the criteria to follow were those adopted by the Supreme Court in the Paramount and Schine cases. They require us to determine, in each *instance,* whether a particular run is unreasonable." (C. C. H. Tr. Reg. Rep., page 64,758.)
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> "So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into the determination,—such as admission price, location of a theatre, its policy with regard to the showing of double features, gift night and other exploitation methods, the rental terms, the extent to which comparative theatres compete with each other,—and (c) that he has been damaged by such action.
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> "As to the manner of proof, the Courts have adopted a liberal attitude, and have permitted in-

ferences of *joint* action to be drawn from *parallel* action.

"But, regardless of burden of proof, in the last analysis, the trier of facts must be satisfied that the practices which the plaintiff claims to have injured him were the result of joint action." (Page 64,758.)

"In determining the matter after a complete trial, the question of the burden of proof and of inferences from similar action becomes academic.

"In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of a concert of action, and are unreasonable. Inference from similarity loses its importance when met by positive denials of such action. More, in the realm of commerce, similarity of action, at times, may be the result not of previous agreement, but of solving an identical situation in a similar manner. The facts must be assayed in the light of these principles." (Page 64,759.)*

We know of no better statement of the correct approach to a case of this type.

A. The Evidence Affirmatively Showed Lack of Joint Action, Agreement or Understanding Among the Respondents.

The evidence in this case establishes affirmatively the fact, as found by the court, that in the establishment of the playing position for Puente and of the clearance to which it was subjected each respondent distributor acted "independently and without any contract, agreement, com-

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*Italics the court's.

bination, conspiracy or understanding either express or implied with any other distributor defendant" or with the exhibitors. [F. F. VI, R. 147.] The official of each respondent distributor responsible for the establishment of such playing position and clearance testified unequivocably that such establishment was a matter of his own independent business judgment based upon his own independent consideration of the factors involved and was made without conference, consultation or advice with any other distributor. [R. T. 176, 275, 397, 474, 1416, 1536, 1584, 1607, 1756, 1809, 1824, 1834.] Furthermore, there was affirmative and detailed evidence of the personal investigations and field trips and of the independent accumulation of factual data upon which the particular distributor based its judgment. The branch managers of Paramount, Loew's, Fox and Republic each testified to personal investigation of the area and theatres in question. [R. T. 443, 527, 548, 673, 1812.] In the case of Loew's and again of Fox, the sales managers and district sales managers, respectively, also made personal tours of the area. [R. T. 1606, 1617, 1821.] Other companies accumulated data through personal investigations by salesmen and others. [R. T. 262, 268, 351, 619.] Documentary evidence showing the individual investigations made was also introduced. [Exs. 84, 115.]

There is a wealth of evidence corroborating the absence of any joint action. The court could find no motive for any such action. (Or. Op. 6.) Both of the respondent exhibitors were "independents," neither being affiliated in any way with any of the distributors. Sanborn had no theatre interests except his El Monte Theatre and the small late playing Baldwin Park house, and Edwards

owned about 17* theatres scattered among a number of smaller communities. The court's statement that "I don't believe that Edwards had enough purchasing power to influence the distributors, and certainly Sanborn in his El Monte Theatre, owning simply the El Monte and Baldwin Park Theatres, didn't have any such influence" (Or. Op. 6), and its finding to that effect [F. F. VI, R. 150; F. F. IX, R. 153] is amply supported by the evidence. [See *infra,* p. 70, and R. T. 361, 642, 689, 1449, 1452, 1489, 1620, 1705, 1715.]

Furthermore, it is very important to remember that the distributors who licensed Sanborn's El Monte Theatre did not generally license Edwards' Tumbleweed and Valley Theatres. [F. F. VI, R. 149.] The product of the respondent distributors here involved varied as to quality. Paramount, Loew's, Warner Bros. and Fox generally produced the finest pictures. These four companies, with the occasional addition of RKO, are generally referred to as the "majors." Universal and United Artists also produce some good pictures; Columbia a few good ones and a number of pictures of minor and no importance; and Republic and Monogram are admittedly the producers of "Westerns" and "fillers" and the cheaper pictures. [R. T. 1734-36; see appellant's testimony at R. T. 1174, 1206, 1210, 1221.] In fact, as Mr. Chorak said of the product of the latter two companies, "You give me the three pic-

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**Not* 45, as appellant continually asserts in his opening brief. He reaches his figure by adding to the theatres in which Edwards had an interest a number of theatres owned and operated entirely by other persons who happened to be represented for buying and booking purposes by a corporation in which Edwards was a minority stockholder. [R. T. 49, 52-56.] This buying and booking agency is what was referred to by the witness Smith in his testimony quoted at page 61 of Appellant's Brief. See R. T. 1488-89.

tures that you name and you can take the other seventy." [R. T. 1226, 1228.]

Sanborn, having concededly the largest and best theatre in that entire portion of the San Gabriel Valley and charging the largest admission, was able to secure the finest pictures by purchasing substantially all of the product of the four majors and the better product of United Artists and Universal. Edwards for his Tumbleweed and Valley Theatres secured no product from the four majors and had to rely upon the product of RKO, Columbia, Republic and Monogram, with a few pictures from Universal and United Artists and the balance from producers and distributors not parties to this litigation.* [R. T. 1704-05, 1771-73; see R. T. 200, 750.] There was, therefore, no reason whatsoever for the four major companies who sold Sanborn alone to have any interest in the playing positions which RKO, Columbia, Republic or Monogram established as between the Edwards unit and the Puente Theatre. Likewise the latter four companies, being unable to sell Sanborn, had no interest in whether or not *he* played ahead or behind Puente. The absence of any motive for joint action between the distributors selling Sanborn and those selling Edwards is obvious. Other affirmative evidence supporting the finding that there was no conspiracy or joint action is shown by the original variations between the distributors in the matter of clearances [Ex. Z], and the changes made by several distributors in clearance by reason of their actual individual ex-

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*As the Judge said in his Oral Opinion, "We have the El Monte Theatre which is the real competitor in this case. Edwards, generally speaking, is exhibiting pictures from the minor league and the pictures that the plaintiff seeks are mostly those that are exhibited in the El Monte Theatre." (Or. Op. 10.)

periences in operation. [R. T. 438, 448, 460, 552, 563, 896, 922, 1610.]

There was no evidence whatsoever in contradiction to this testimony. Appellant testified vaguely to the effect that in each of his conversations with the various distributors each asked what availability the other companies were giving him. When pressed, however, to be specific as to the distributors involved all he could remember was "that they discouraged me very much by telling me it is too bad 'but you will have to follow El Monte and all the theatres down there.' I remember that." [R. T. 1237; see R. T. 1211-18, 1233-38.] As far as the major distributors were concerned it was clear from the testimony that they either did not know or did not care about the playing position established for Puente by other distributors. [R. T. 397, 531, 1416, 1607, 1757, 1824.] But in any event the fact that a company was interested in the terms its competitors were offering in a particular area would be evidence of the absence of a conspiracy rather than of its existence. Especially with regards to the minor companies here involved, notably Columbia, Monogram and Republic, the evidence is clear that their determination, while made in the exercise of their own business judgment, was affected by the fact that they had to offer at least as good terms both to the appellant and to Mr. Edwards in his El Monte theatres as were offered by other companies in order to retain the business. [R. T. 206, 228, 236, 270, 1150-51, 1817-18; *Cf.* 496, 1454.] Thus Columbia, which had independently determined to grant the Valley and Tumbleweed Theatres a clearance of 21 days, was forced to reduce that clearance to 14 when Chorak refused to buy their pictures. [R. T. 270,

295.] And the force of competition between distributors is nowhere better shown than in the so-called "Republic letter" which appellant fantastically argues is evidence of a conspiracy. [Ex. 38; Op. Br. 16-17.]

Republic is admittedly one of the weakest in product of all distributors here involved. [R. T. 1206-10.] Because of the nature of its product, primarily "Westerns" and "fillers," it frequently sells "in bulk," as it were. It was negotiating a contract for a number of its pictures for the season 1947-48 to be played in the Edwards' Tumbleweed and Valley Theatres in El Monte. It had been advised that the Puente Theatre was about to open and of the demands of Mr. Chorak for a preferred playing position. [R. T. 1211.] Edwards was asking from the company a 21-day clearance over the Puente Theatre in favor of his El Monte situation. [Ex. J.] Republic had concluded that a 14-day clearance was proper in its independent judgment. [R. T. 1810-11.] However, if it contracted with Edwards to give him such a clearance for its pictures during the coming year, and then found that its competitors, or any of them, were giving Edwards *less* clearance and Puente a *better* availability, Republic would have been in the same position in which Columbia found itself, with Puente refusing to buy its pictures, except that Republic would have been unable to meet such competition because it was bound to Edwards by a long term contract. For that reason Republic's branch manager very wisely told Mr. Edwards' representative that he would grant a 14-day clearance only upon the condition that if any other company serving Edwards granted a more favorable availability to Puente, Republic should be free to meet such competition. The letter proves exactly the reverse of appellant's contention. Rather than

show conspiracy it affirmatively demonstrates the active force of competition in the industry.

The record, therefore, shows uncontradicted, affirmative evidence of the individual action on the part of each distributor and the absence of any joint action or conspiracy, which evidence was believed by the trier of the facts. It is the same situation as presented in the *Westway* case, *supra,* where the court said:

> "There is an entire absence of direct evidence to show that their action was concerted, but on the contrary full and convincing evidence that each acted independently on its own judgment." (30 Fed. Supp. 830 at 833.)

Accord:

Fifth and Walnut v. Loew's Inc. (2nd Cir., 1949), 176 F. 2d 587, 594;

Windsor Theatre Co. v. Walbrook (4th Cir., 1951), 139 F. 2d 797;

Fanchon & Marco v. Paramount Pictures, Inc., supra.

B. Since the Availabilities Established for Puente and the Clearances Granted to the El Monte Area Theatres Were Determined by Individual Application of Correct Economic and Legal Factors to Similar Facts There Could Be No Inference of Conspiracy From the Results Reached.

In spite of the affirmative evidence of individual action appellant here asserts that the court erred in not drawing an inference of conspiracy from the fact that each of the distributors established an availability for the Puente Theatre behind theatres served by it in the El Monte area.

It is the province of the trier of the fact to draw or refuse to draw inferences from the facts in evidence and its refusal to draw any particular inference will be upheld unless clearly erroneous. (*U. S. v. Natl. Assn. of Real Estate Boards* (1950), 339 U. S. 485, 496; *Gary Theatre Co. v. Columbia Pictures Corp.* (7th Cir., 1941), 120 F. 2d 891.) Furthermore, in the face of the affirmative evidence above referred to, the trial court's failure to draw an inference diametrically contrary thereto could be upset only if other facts were of such a nature as to make such affirmative testimony wholly incredible. (*Grace Bros. v. Comm. Int. Revenue* (9th Cir., 1949), 173 F. 2d 170, 174, and cases cited.) These established principles of law are alone sufficient to sustain the judgment below. However, aside from appellant's burden on appeal, the evidence in this record is such that no inference of conspiracy, agreement or wrong-doing could be drawn against these respondents. Their acts in establishing the playing position of the appellant's theatre and in granting the clearances to its competitors were the necessary result of applying the established economic facts and uniformly approved legal rules to a fairly simple factual situation. "Similarity of action under substantially like circumstances affecting each distributor is not proof of conspiracy." (*Windsor Theatre Co. v. Walbrook Amusement Co.* (4th Cir., 1951), 189 F. 2d 797, 799. Accord: *Westway Theatre v. Twentieth Century-Fox,* 30 Fed. Supp. 830, at 833; *Dipson Theatres v. Buffalo Theatres* (2nd Cir., 1951), 190 F. 2d 951, at 958, 960; *Fanchon & Marco v. Paramount Pictures, Inc.,* C. C. H. Tr. Reg. Rep. 64,753, at 64,759, 64,760, 64,764, 64,767; see excellent discussion, *Peveley Dairy Co. v. U. S.* (8th Cir., 1949), 178 F. 2d 363.)

When appellant prior to the opening of his theatre requested each of the distributors to establish a playing position for his theatre "immediately following Los Angeles first run," it became necessary for such distributor to determine the place in the system of successive runs which it would accord that theatre. That obligation was imposed upon the distributors whether or not a competitor demanded clearance and the requests for clearance by Sanborn and Edwards were merely additional evidence of the necessity of determining such position.

Under the decision in *U. S. v. Paramount Pictures, Inc.*, 66 Fed. Supp. 323, Puente's position in that area had to be determined with reference to its grossing potentialities as compared to the grossing potentialities of those theatres in which it was in substantial competition. Each distributor, therefore, had to make three factual determinations: (1) What theatre or theatres served by that particular distributor were in substantial competition with the Puente Theatre?; (2) What was the relative position of the Puente Theatre as to grossing potentiality in comparison with such other theatre or theatres?; (3) What clearance should be granted to the theatre or theatres having the greatest grossing potentialities over its competitor?

As far as the determination of the first two questions is concerned each distributor came to the conclusion that the Puente Theatre was in substantial competition with the three theatres in the El Monte area, and that the El Monte Theatre on the product that theatre played and the Valley and Tumbleweed Theatres on the product those theatres played had a substantially greater grossing potentiality and consequent ability to pay rentals than did the Puente Theatre. Those were likewise the conclusions of the lower court when presented with the same facts as

were presented to the distributors, as declared in its Oral Opinion and its Findings. Upon the third question the distributors came up with varying answers but within a narrow range of variation as might be expected. As to their answers within that range the court, faced with the same facts, believed them reasonable. *When the court itself reached the same factual answers as did the distributors, how can those answers be deemed evidence from which a conspiracy must be inferred?* And the evidence in support of the answers is overwhelming.

1. The Finding of the Court That the Puente Theatre Was in Substantial Competition With the El Monte Valley and Tumbleweed Theatres and Not With Other Theatres Is Amply Supported by the Evidence.

The question as to what theatres are or are not in substantial competition with each other depends almost entirely, as far as this case is concerned, upon the physical characteristics of the area. In this case the judge had before him not alone the unanimous opinion of every distributor respondent, fortified by ample reasons, that the substantial competitors, as far as Puente was concerned were the theatres in the El Monte area and hence its playing position had to be determined with reference to those theatres and not others. [R. T. 268, 293, 303, 351, 442, 444, 466, 517, 527, 549-50, 618, 672, 694, 1615, 1618-19, 1804.] The court also had its own judicial knowledge of the physical facts not only as a matter of law but as a matter of personal familiarity therewith. [R. T. 624, 657; Or. Op. 12, 15.] The court had no doubt whatsoever but that the "competitive area" for the purposes of

this litigation included only Puente and the El Monte area theatres and it so found. [R. T. 654-57; Or. Op. 12, 15; F. F. VI, R. 140.]

An examination of the map [Exs. 1 and A] especially in the light of the foregoing record references will immediately demonstrate the correctness of the court's conclusion. The "trend" of shopping and entertainment traffic is naturally from east to west—from the smaller communities to the increasingly larger towns of El Monte, Alhambra, Pasadena and Los Angeles. [R. T. 466, 527, 739-40, 1492-94.] The theatres lying to the west of El Monte, which include the Temple City, Rosemead, Garvey and Monterey Park theatres, lie naturally within the orbit of Alhambra. [R. T. 617, 654, 677, 1535, 1656.] El Monte, as a substantial, thriving city with complete and comprehensive shopping and entertainment districts, interposes itself between them and Puente. As the court said in its Oral Opinion (p. 12), "I feel the competitive area is the area including El Monte and lying easterly thereof; I do not believe that the competition is with any theatre that lies west of El Monte." Covina residents will go either to Pomona or Pasadena for their major theatrical entertainment [R. T. 740]; Baldwin Park residents to El Monte. [R. T. 444, 528.] As far as Puente is concerned, it was testified to be and found to be within the orbit of El Monte as the important trading and business center. [R. T. 466, 527, 1493; F. F. VI, R. 148.]

The only conflict in the evidence on this point is that created by appellant's conflict with himself. Appellant's original letter [Ex. 115] written November 21, 1947, declared that he was "strictly non-competitive" with any other theatre at all, and he repeated that claim in a letter to the Branch Manager of Loew's under date of June

3, 1948.* [Ex. 115.] In his complaint, however, he claimed that he was competitive with the theatres in El Monte, Five Points, Baldwin Park, Monterey Park, Covina, Rosemead and Montebello. At the trial he eliminated Montebello and Monterey Park [R. T. 656, 1289], but in his brief on appeal, however, he not only reincorporates Monterey Park, but he adds Garvey, Temple City, and Azusa. (Op. Br. 7, 10, 17, 20, 28, 29.) From the position that he is competitive to *nobody* he has shifted to the position that he is competitive to *everybody*.

In Appellant's Opening Brief he advances the untenable proposition that the court should have determined what theatres were in competition with *El Monte* rather than what theatres were in competition with his own house. (Op. Br. 28, 33 and *passim*.) As far as appellant is concerned he can fairly be interested only in his playing position with respect to those theatres which are in substantial competition with *him*. Whether or not some other theatre may compete *with El Monte* is of no concern to appellant if it is not in substantial competition with *him*.

The unassailable validity of the finding as to substantial competition eliminates from the discussion questions concerning the playing position, clearances, grossing potentialities, and other factors involving those theatres which were found not to be in substantial competition with appellant.** We may thus refrain from extended argument on the treatment accorded them by the distributors. How-

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*"I am not any competition (let alone substantial competition) to anyone due to special circumstances of rural and Mexican population." [Ex. 115.]

**For this reason the court indicated in its opinion denying a new trial that it had been in error in making findings of clearance with respect to these theatres after having found that they were not in the area of substantial competition. [R. 190.]

ever, in so doing we do not want the court to think for one moment that the intemperate accusations in appellant's brief are founded upon fact since they are not. His claim that he has been accorded "last run" behind all these theatres and is required to play pictures at higher prices long after they have played them is entirely without foundation. Computations furnished the court below in our briefs, and based upon Exs. N to Q, T, Y to X, HH, and KK, show that during the period of approximately eight months between the opening of the theatre and the filing of the complaint appellant had played not less than 54 feature pictures ahead of at least one and in many cases three to four of these other theatres, and in all except five of such instances paid substantially less* for such right than did such theatres.

2. The Finding of the Court That the Puente Theatre Had a Substantially Poorer Grossing Potentiality and Consequent Ability to Pay Film Rentals Than Its Competitors in the Competitive Area Is Amply Supported by the Evidence.

In its Oral Opinion the court said:

> "There is absolutely no question in my mind that the Puente Theatre cannot compete so far as license fees are concerned with the other theatres involved. It cannot pay the price. It cannot pay the price, and, even if I were to hold in their favor and direct each be given an equal clearance, the Puente Theatre

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*In many instances Puente paid less than 50% of the film rental of one or more of the other theatres and played ahead of them. *E. g.*, "Three Daring Daughters" (Loew's): Puente paid $62.50 and played ahead of Monterey Park at $216.00, Covina at $137.50, and Rosemead at $121.50. [Ex. T.]

could not in real competition compete with the Tumbleweed, the Valley or the El Monte." [Or. Op. 13-14; F. F. VI, R. 148.]

The physical situation of the respective theatres is itself conclusive of the validity of the court's findings. The El Monte theatres are in a centrally located, highly congested urban area, with the established and thriving City of El Monte as a nucleus, exercising all the drawing power of a modern urban community over a large area and many thousands of prospective movie-goers. Sanborn's El Monte Theatre is the largest and finest in that section of the San Gabriel Valley and charges the highest admission; physically, the Tumbleweed is at least the equivalent of appellant's theatre. [R. T. 109, Exs, C, I.] The Puente Theatre, on the other hand, is located in a wholly rural area, its clientele composed, as appellant himself states, "mostly of Mexican nationals* and local farmers." [Ex. 84.] It is on what is in effect a side road in an unincorporated village with no drawing power whatever, and with no real potential patronage other than that of the bare 2,000 people in its immediate area. It was the unanimous opinion of the distributors that because of these factors the Puente Theatre could not be expected to produce for them anywhere near what the El Monte theatres could.

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*The effect of this feature on the grossing potential of the Puente area, with 43% of its inhabitants being Spanish-speaking, is graphically illustrated in the evidence. Tuesday was set aside in Puente for an all-Spanish program. From the date of its opening until the filing of the complaint, the theatre *averaged* a gross of $168.42 for each such program, which was *more* per unit than that ever grossed by the theatre on any picture distributed by the defendants, including those like "Red River" and "Command Decision" which it played ahead of El Monte. The average per unit gross on its 26 most productive English language pictures was $103.57. [See Appendix, Part B; R. T. 1255-56.]

[R. T. 319, 355, 466, 564, 1443, *et seq.,* 1483, 1623, 1643-44, 1672, 1676, 1807, 1815.]

The evidence in the record as to the actual results of the theatre operations in Puente as compared to those in the El Monte area demonstrates the soundness of the distributors' conclusions and the court's findings as to grossing potential and consequent ability to pay rentals, and also completely justifies the playing position accorded Puente.

Appellant's brief is most misleading on this subject. It practically ignores the El Monte Theatre which appellant conceded at the trial could far out-gross Puente. [R. T. 470, 482, 485, 564.] It equally ignores the large, modern Tumbleweed Theatre which was treated by witnesses and the court alike as being in the El Monte area, although fortuitously located just outside the political boundaries of the city.* It levels its entire attack upon the smaller, older Valley Theatre although the evidence was clear that the Valley and Tumbleweed played the same pictures each within a few days of the other. Furthermore, appellant's use of figures is wholly unsound.

On page 20 of the Opening Brief appellant sets forth a table of grosses and rentals paid. He argues from the table that because the Puente Theatre grossed more than the Valley and paid total rentals in excess of the Valley, the finding of the court that Puente did not have the grossing potentiality of its competitors and could not pay equivalent rentals is clearly erroneous. The table presented is, to say the least, highly misleading and the conclusion drawn demonstrably false.

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*See footnote, p. 8, *supra.*

The table itself shows that the Puente Theatre grossed substantially less than half as much as did Sanborn's El Monte Theatre and also less than half as much as did the two Edwards' theatres in the El Monte area. The Sanborn theatre paid almost three times as much in rentals as did Puente. As far as the figures given are concerned they show that Puente did pay almost as much in gross rentals as did the two Edwards' theatres. However, upon the matter of gross rentals the statement is entirely misleading for the simple reason that the comparison *is not made with respect to the particular distributor respondents who received the particular rentals, nor with respect to the same pictures.*

It must be remembered that Puente was the only one of the four theatres concerned that purchased the product of all the distributors. As pointed out, Sanborn, in the El Monte area, licensed exclusively the product of the major companies. Edwards had none of the major product and relied almost entirely upon the pictures distributed by Columbia, RKO, Republic, Monogram and companies not parties to this suit.* Puente, on the other hand, had its choice of all the products of all the distributors and could and did select the very best pictures from each.

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*The rental figures given by appellant for the Valley and Tumbleweed do not include any sums paid by Edwards for product distributed by others than the respondents. That this is substantial is indicated by the testimony that Edwards played 312 pictures in the space of a little over a year in his Tumbleweed Theatre and 240 in the Valley Theatre [Ex. SS, R. T. 1709], which was greatly in excess of those sold by the four respondents who were serving him. [Exs. 28, 28A, 29, 33, 40, 41, 57, 58, 169, 170.] There was no evidence as to rentals paid non-defendant distributors.

The total rentals paid by appellant were therefore paid to *ten* distributors while those paid by Edwards' theatres were paid to *four* only. The total grosses received by Puente were the result of the exhibition of all the best pictures of all the companies;* those received by the Tumbleweed and Valley were from the pictures of the three weakest companies, plus the "minor-major", RKO.

Obviously Columbia, RKO, Republic or Monogram in determining the playing position of Puente with respect to the two Edwards' theatres in El Monte, had to consider what the return would be *to them on their pictures* from the respective exhibitors. What Puente was willing or able to pay *Loew's* for its pictures (the best in the industry) was not a matter with which *Columbia* or *Republic* were or properly could be concerned. It is, therefore, essential to see how the gross rental expectancy affected *each individual distributor.*

Mr. Sanborn's El Monte Theatre, playing the product of the major distributors and hence by far the most desirable pictures, was "the real competition in this case . . . and the pictures that the plaintiff seeks are mostly those that are exhibited in the El Monte Theatre." [Or. Op. 10; R. T. 1204-10, 1220-22, 1226-29.]** There fol-

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*And also the Spanish pictures which accounted for $9,668.28 or 17½% of the total gross figure given by appellant. [Ex. DD.]

**Appendix, Part B, attached gives a list of the 26 pictures producing the highest grosses in the Puente Theatre from opening to time of trial, with grosses and playing position. All but three (one each from Columbia, Monogram, and RKO) were pictures released by distributors serving the El Monte Theatre alone.

lows a table showing the gross rental paid to each distributor by Sanborn's El Monte Theatre on the one hand, and appellant's Puente Theatre on the other hand from the opening of the Puente Theatre to March 31, 1949:*

Distributor	Puente	El Monte
Fox	$2,391.45	$ 8,970.20
Loew's	2,306.66	7,175.30
Warner Bros.	1,458.68	6,173.18
Paramount	1,443.27	5,333.65
Universal	983.74	5,414.48
United Artists	883.92	2,141.00
	$9,467.72	$35,207.81

Thus it appears, from appellant's own figures, that the El Monte Theatre paid from three to five times as much in film rental to the distributors serving it as did Puente for the same pictures.

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*This table and the one following are copies of compilations made *by appellant* in his brief below filed prior to the court's opinion and findings and are purportedly based on cut-off cards in evidence. We have no information as to the method used in arriving at the table. Our own examination of the exhibits indicates that it is incorrect in appellant's favor. For example, the appellant's figures for Monogram are as follows: Puente, $630.52; Tumbleweed, $699.00; Valley, $437.50. Actually the Monogram cut-off cards [Exs. 169, 170, 172] show the following: Puente (28 pictures), $678.02; Tumbleweed (27 pictures), $839.00; Valley (22 pictures), $626.50.

The following table gives the same information for Puente, Valley and Tumbleweed Theatres individually, and then for the combined Tumbleweed-Valley situation:

Distributors	Puente	Tumbleweed	Valley	Tumbleweed-Valley
RKO	$1,835.64	$3,369.17	$2,060.43	$ 5,429.60
Columbia	1,394.01	2,197.58	1,839.15	4,036.73
Republic	418.00	967.25	875.00	1,842.25
Monogram	630.52	699.00	437.50	1,136.50
	$4,278.17	$7,233.00	$5,212.08	$12,445.08*

These figures show that RKO, Columbia, Monogram and Republic received three times as much film rental from the Tumbleweed and Valley as was paid to them by Puente for the same pictures. It also shows that the Valley Theatre alone paid substantially more rental to every distributor serving it (with the exception of Monogram)** than did Puente.

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*In addition the Tumbleweed paid $128.00 to Universal, $608.95 to United Artists, and $230.00 to Warner's; the Valley paid $202.25 to United Artists and $133.00 to Warner's.

**The difference as to Monogram is due to the fact that (1) Puente played more Monogram pictures than the Valley, and (2) Puente played Monogram's only good feature picture "Babe Ruth Story" [R. T. 1126, 1136-37] and paid $118.00 rental, while Valley did not play the picture. On the Monogram pictures played by both theatres, Valley paid more *for every one* than did Puente. [Exs. HH, 169, 170, 172.]

The above are appellant's own computations. Respondents attach as Appendix, Part C, a computation made by them showing the average film rentals paid per picture by the four theatres involved during the period from the opening of the Puente Theatre to the filing of the complaint herein. The table shows that Sanborn's El Monte Theatre paid an average of $214.74 per picture to the distributors serving it, as compared to the average of $51.34 paid by Puente and that the Tumbleweed and Valley paid an average of $53.83 and $48.03, respectively, as compared to Puente's average on the same product of $28.43.

Appellant gives "examples" of payments by Puente "comparable to those paid by the protected Valley Theatre." (Op. Br. 18, 22.) His "examples" are isolated, and wholly unique; thus their use is highly misleading. He cites Republic. Out of eleven Republic pictures played by both Puente and Valley up to the date of the complaint, Valley paid from 20% to 65% more than Puente on nine [Ex. N] including "Bill and Coo", cited by appellant. As regards "Red River", where Puente played first with $504 gross, appellant fails to point out that Tumbleweed, playing *after* Puente and before Valley, grossed $1,145 on that picture, or a total in Tumbleweed and Valley for their late playing of over $1,500. [R. T. 1666-67.] A cursory examination of Exhibits N, O, P, Q, T, V, W, X, HH and KK will quickly show that Puente never paid but a fraction of what its competitors paid for the same pictures.

These computations which were before the trial court clearly substantiate its finding. There was other equally

forceful evidence in the record. It was admitted by appellant that the Puente Theatre could not gross what the El Monte Theatre grosses [R. T. 482, 485, 1192, 1194] and that Chorak would not pay El Monte film rental. [R. T. 1076, 1186, 1192-94.] Loew's offered appellant the right to play ahead of El Monte if he would pay as much money, and appellant replied "I could not begin to approach their rental." [R. T. 564.]

The evidence as to "competitive bidding" is enlightening. In January, 1949, Paramount offered appellant the right to bid for the run against the El Monte Theatre on all pictures. [Ex. S.] RKO made a written offer to permit appellant to bid against the Edwards' theatres in February of that year. [Ex. JJ.] He could have had bidding from Fox [R. T. 1630] and Loew's. [R. T. 564.] He never made a competitive offer on a single picture to the date of trial. In answer to Paramount's invitation appellant told that company "that in his opinion he could not gross in Puente as much as El Monte pays in film rental." [R. T. 470.] That appellant was correct is shown by Appendix, Part D, attached. This gives comparable figures between Puente and the El Monte Theatre on the 36 leading pictures of the majors, played in both theatres. It shows that on such top pictures Puente grossed approximately $10,500 which was over $2,000 *less than the amount El Monte paid in film rental* for the identical pictures. On the pictures "Red River" and "Command Decision," mentioned in appellant's brief at page 65 as demonstrating his grossing potential upon a prior run

basis, Puente's grosses were approximately $500 in each instance. The average El Monte Theatre gross on pictures from major companies was approximately $1,200 per picture. [Exs. 90, 103, 118, 136, 154, 164.]

Respondents' Exhibit PP is conclusive support for the court's finding. This was a "play-off" on the Paramount picture "Pale Face" (a top Bob Hope attraction), showing successive exhibitions starting from Los Angeles and running through the entire San Gabriel Valley with dates and rental returns. The picture was played by Puente on its preferential availability from Paramount of 7 days after El Monte. In Puente it was the fifth largest grossing picture appellant ever played. (Appendix, Part B.) In the sequence of 23 theatres Puente played *ninth*. On its percentage-of-gross return to the distributor it was *twentieth,* paying less money than all except three small theatres in the entire valley. Witnesses described the play-off as "typical." [R. T. 1401-06.] It is a graphic demonstration of the soundness of the distributors' judgment as to Puente's potential. There is not only substantial evidence to support the court's finding; the finding is the only one possible under the facts.

3. The Finding That the Clearances Established Were Reasonable as to Length Is Entirely Supported by the Evidence.

Appellant has made no substantial point that the periods of time determined by the various distributors as proper clearance were unreasonable, his argument being entirely that no clearance at all should have been granted. The

periods determined by the distributors varied from 7 days to approximately 21 days, or one to three weeks, with the majority giving a clearance of 14 days or two weeks. There was evidence that clearance is reckoned in units of weeks (7, 14 or 21 days) because of the convenience of exhibitors [R. T. 1406, 1453-55] so that the variation was between one week and three weeks with the majority of the distributors choosing two. Under the pressure of competition Columbia, which had established the longest clearance of three weeks was compelled to shorten its clearance to 14 days or two weeks, which was the availability at which it served appellant during the entire period. [R. T. 269-70.]

The underlying evidence as to what period should constitute reasonable clearance was that of the distributors and demonstrated conclusively that they reached their answers based upon the appropriate factors referred to in the *Paramount* decision and upon their wide experience in the industry. [R. T. 197, 268, 351, 440, 448, 466, 471, 486-87, 547, 551, 612, 673, 1420, 1443, 1453, 1482, 1607-13, 1636, 1672, 1806, 1823.] In fact, Paramount, which granted appellant 7 days, had originally established 14 days and reduced the clearance because of an unusual experience on one picture. [R. T. 440.] The two-week clearance is normal in the entire area. [R. T. 439.] It was the clearance granted Pasadena over the El Monte theatres and the clearance granted Alhambra over most of its subsidiary communities. [Ex. Z.] The 14-day clearance was also the clearance held reasonable in the

case of *Westway Theatre v. Twentieth Century-Fox, supra.* Additional evidence as to its reasonableness was presented by the action of the Appeals Board of the Motion Picture Arbitration Tribunal set up under the *Paramount* consent decree and referred to in the testimony. In the case of *In re W. J. Edwards, Jr.,* Opinion No. 55, that Board granted clearance to the El Monte Theatre over the Tumbleweed Theatre *one mile* away at 28 days or *four* weeks. [R. T. 752.] In the case of *In re Steve Chorak,* Opinion No. 124, the Tribunal established the clearance in favor of Laguna Beach over the San Clemente Theatre, which the appellant here was then operating and which was located approximately *12 miles* away, at 7 days or *one* week. [R. T. 1043-45.] The distance here involved is approximately *six miles* which indicates the reasonableness of the clearance of 14 days or *two* weeks. There was no evidence presented that indicated any unreasonableness in any of the varying clearances granted, and the court found no such unreasonableness. [Or. Op. 9-16; F. F. VI, R. 147.]

The entire record demonstrates, therefore, that the factual determinations made by the distributors in this case were the inevitable result of the application of established legal and business principles to uncontrovertible fact. No inference of conspiracy could be found from the fact that a similar result was reached. Obviously two

and two still make four for motion picture distributors as well as other persons. Upon the same facts the lower court reached the same result as did the distributors. We submit that it could not do otherwise. An inference of conspiracy would arise only if some other result had been reached. (*Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2nd Cir., 1951), 190 F. 2d 951.)

Appellant attempts to draw some inference of improper action on the part of the *distributors* from the fact that the *exhibitors* Sanborn and Edwards each requested a clearance for their respective theatres in the El Monte area from the particular distributors who were licensing pictures to them. As the court found, and is obviously the case, this was only the normal action of normal businessmen. [F. F. VII, R. 151.] Under the principles of *U. S. v. Paramount Pictures, Inc.*, already referred to, an exhibitor is entitled to clearance over his competitor if he meets the qualifications stipulated in that opinion, and reasonable clearance in favor of such exhibitor is "essential to the distribution and exhibition of motion pictures and of benefit and necessary for the reasonable conduct of its business." (66 Fed. Supp. 323, 342.) It was and has always been the custom in the motion picture industry for exhibitors to demand establishment of particular availabilities or clearances whenever they open a new theatre or whenever a new theatre comes into their area. [R. T. 1460.] These exhibitors did no more in their request for clearance against appellant than did appellant in his request to play immediately following first

run Los Angeles, and hence at least a month or more ahead of Messrs. Sanborn and Edwards.

In the *Westway* case, *supra,* the defendant exhibitor, together with other exhibitors in the same area, wrote similar letters demanding clearance. The court there declared there was nothing unusual in this fact. It said (30 Fed. Supp. 830, at p. 833): "It seems to be a common occurrence in the business that older and established theatres in the vicinity of a new theatre demand or at least seek a clearance over the new theatre."

Even if the exhibitors agreed beforehand between themselves to make such requests, as found by the court,* it does not follow that there was anything wrongful in the demands. Each exhibitor had a right to ask for clearance and the fact that each understood such request was to be made by the other does not make their action wrongful. In other words, an agreement to do a legal act in a legal way does not constitute conspiracy. And, as pointed out, the determination of whether to grant clearance and what clearance was to be granted was based upon the distributors' own individual appraisal of the facts. In fact, Mr. Edwards' request for clearance in favor of his Azusa theatre, and for 21-day clearance in favor of his "El Monte situation" was denied by all distributors.

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*The court's finding in this connection was in the face of direct denials by both Sanborn and Edwards [R. T. 727, 778, 1720, 1774] and was based solely upon the fact, which we submit was purely coincidental, that the letters from these exhibitors were dated within a day of each other. [R. T. 753.]

II.

The Finding That None of the Respondents Have Established or Maintained in This Area an Arbitrary, Uniform, or Unreasonable System of Runs and Clearances Is Fully Supported by the Evidence.

Throughout appellant's brief it is continuously asserted that he has been made the victim of what he describes as a "fixed, non-competitive system" of runs and clearances, conspiratorial in origin, which he asserts was directed against him with the sole purpose and effect of preventing him from competing with other theatres. Under the record the claim has absolutely no basis whatsoever.

We have pointed out the economic factors which require, as every court has recognized, (i) that pictures must be distributed by a method of successive runs; (ii) that where competition exists there should be adequate clearance between such runs for the protection of distributors and exhibitors alike; (iii) that in determining the sequence of runs and the extent of clearance the primary factor must be the relative grossing potential and consequent ability to pay rentals of the theatres in the area involved. From an application of these factors by each distributor in order to operate his business it must be obvious that a pattern of distribution will inevitably occur. The physical and economic factors in any area are identical for each distributor. If a particular theatre or area has a greater grossing potentiality than another, that fact

applies whether the pictures involved are those of Paramount or those of Loew's.*

There can be no dispute over the fact that Los Angeles has a greater grossing potentiality than Pasadena, that Pasadena has a greater grossing potentiality than Alhambra, that Alhambra has a greater grossing potentiality than El Monte, and that El Monte has a greater grossing potentiality than Puente. [See Ex. PP.] Inevitably under the system of successive runs the pictures will play first in Los Angeles, then Pasadena, then in Alhambra, then in El Monte, and then in Puente. The fact that each distributor so licenses the exhibitions is no more evidence of a conspiracy than is the fact that every bank charges more interest on its loans than it pays on its deposits.

Furthermore, the "pattern" inevitably tends to become uniform by reason of the fact that uniform availability from all distributors serving a particular theatre is almost a necessity as far as the exhibitor is concerned. As the testimony shows he cannot adequately buy or book his pictures unless his availabilities are substantially the same from each of his sellers. [R. T. 1453-56, 1508, 1631-33.]** In addition, the element of intense competition between the distributors for the business of a particu-

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*"In sum, the limitation of the plaintiff to a 21-day availability finds support in special factors which affect the distribution of motion pictures. As these factors called for the same result, they produced an identity which did not spring from design, but from similarity of situations." *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753, at 64,767.

**Uniformity was what Chorak wanted. [Letter of Nov. 21, 1947, Ex. 115.] His complaint is that he was not given *uniformly* a better position.

lar exhibitor impels uniformity, especially among the distributors with the poorer product. If the exhibitor gets a better playing position from any distributor, he uses that to force the other distributors into an equally better position on the threat of a refusal to buy, just as appellant did in this case. [R. T. 269-70, 496, 1456.] As Judge Yankwich said in *Fanchon & Marco v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753, at 64,764:

> "As a general rule, the same availability is established by all producers. But here, again I am convinced that this was not the result of concert but flowed from the very nature of the clearance system. Indeed, instances exist of different availabilities [in] the same theatre for the productions of different companies. Whenever this occurred, it brought objections from theatre-owners who complained that, by this method, they were prevented from relying upon a 'constant flow' of pictures."

The "pattern" in the San Gabriel Valley was just exactly the inevitable pattern which the laws of economics compelled. Alhambra played one week behind Pasadena. Covina and El Monte, as the nothern and southern urban centers of the San Gabriel Valley, each played 14 days behind Pasadena. The theatres lying west of El Monte, such as the Rosemead, Garvey and Monterey Park theatres, being within the orbit of Alhambra, played behind Alhambra, but sufficiently so to permit the El Monte theatres a priority over them in the succession of runs under ordinary conditions. Over a period of years, during which time there was no substantial change in the relative economic situation, these areas and theatres found and maintained their inevitable position. There was nothing "fixed" about this "system" except as it was fixed

by the laws of economics.* From 1930 to the building of the Puente Theatre in 1947 there were no changes in the relative economic statuses of the different areas and very few new theatres built. [R. T. 740-43.] These were years of depression followed by strict war-time restrictions against construction. When new theatres were opened, however, they were accorded a new position dependent upon the same economic factors. The Tumbleweed Theatre in the El Monte area, constructed in 1939, was compelled, even after litigation in the Arbitration Tribunal commenced by Edwards, to accept a position of 28 days behind Sanborn's new El Monte Theatre, because the latter had a substantially better grossing potential. [R. T. 1706.] When the Temple City Theatre was built by Edwards, he was compelled by the distributors to play from 7 to 14 days behind the larger San Gabriel houses of which he owned one, which themselves played behind Alhambra. [Ex. Z; R. T. 1716, 1737.] When the Crown Theatre in downtown Pasadena was remodeled to make it equal in stature to the existing first run theatres, it was given the opportunity for such first run showing [R. T.

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*Of course it was this "system" to which both the court and counsel were referring in the quotation given on page 44 of Appellant's Opening Brief and to which the witness Eckhart referred to the testimony quoted on pages 43 through 46. In fact, as appellant has carefully refrained from pointing out, Mr. Eckhart fully explained this testimony on the next page after that quoted by appellant [R. T. 700] where he was asked if he knew how the clearance system had been set up, and replied: "Well, yes, I know how it was. It was set up by competitive selling and where you get the most money, and so on and so forth, but it has been the practice and custom for clearances of various characters to be established everywhere." (See *Westway Theatres v. Twentieth Century-Fox,* 30 Fed. Supp. 830; *Windsor Theatre Co. v. Walbrook Amusement Co.,* 94 Fed. Supp. 383, 390, s.c. 189 F. 2d 797.)

501, 1447.] The new drive-ins occasioned many changes. [*E. g.,* R. T. 1425, *et seq.;* R. 182.] Thus, rather than being "fixed", the system was, as Judge Yankwich found in the *Fanchon & Marco* case, "in flux."

When appellant's Puente Theatre was constructed, it too had to find its position in the sequence of successive runs, and that position had to be determined with respect to its substantial competitors, which were the El Monte theatres. By the laws of economics that position had to be inferior to that of those theatres. Basically appellant's contention is that the erection of his theatre at Puente necessitated *as a matter of law* the disregard of the entire basis of the distribution of pictures, and the establishment by one or more of the distributors of a playing position for his theatre with reference to its competitors completely unjustified by the character of the community in which it was located, in order to avoid violation of the anti-trust laws. If the distributors had given Puente the preferred position which it demanded in violation of ordinary common sense business principles, it would have been an act in violation of the rules of law expressed in the cases and would then, and only then, be evidence from which an inference of conspiracy could be drawn.*

The uniform, arbitrary and fixed systems of clearance which have been condemned by the courts have been those

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*"At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved to adopt *a different pattern of distribution than the one actually employed.*" *Dipson Theatres v. Buffalo Theatres* (2d Cir.), 190 F. 2d 951, 958.

which flouted such economic laws—not those which followed them.* *U. S. v. Paramount Pictures, Inc., supra,* condemned the fixed system of runs and clearances there under survey because it "was designed to protect their [the distributor defendants'] *theatre holdings* and safeguard the revenue therefrom" and because it was one "which prevented any effective competition *by outsiders* . . . It involved *discrimination* against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or improving theatres *while the major defendants possessed superior advantages.*" Thus "the system of clearances and runs was such as to make competition *against the defendants* practically impossible." (85 Fed. Supp. 881, 888.) And the court *specifically* refused to find that any general policy of discrimination against exhibitors existed, saying, "The decision of such controversies as may arise over clearances should be left to local suits in the area concerned." (66 Fed. Supp. 323, 342; see 85 Fed. Supp. 881, 888.)

The Supreme Court in *U. S. v. Paramount Pictures, Inc.,* 334 U. S. 131, condemned only those fixed and uniform clearances which "had no relation to the competitive factors which alone could justify them . . . and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade." [P. 146.] And in *Schine*

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*As Judge Yankwich said (*Fanchon & Marco v. Paramount Pictures, Inc.,* C. C. H. Tr. Reg. Rep. 64,753, 64,757), "No cases exist which hold that the system, *in itself,* is a violation of anti-trust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, *condemning only unreasonableness in the preferences.*"

Theatres v. United States, 334 U. S. 110, 124, the court reversed the District Court's finding of "unreasonable clearances" on the specific ground that the lower court had not found in what manner the clearances were unreasonable.

The cases relied upon by appellant are themselves strong authority that clearances, though uniform, are not conspiratorial or illegal. In every case, the court's condemnation rested on a finding that the distributors had *disregarded* the economic factors involved, induced to do so by the intent to favor some particular person or company for ulterior motives.

Goldman v. Loew's Inc. (3rd Cir., 1945), 150 F. 2d 738, was a monopoly case under Section 2 of the Act. In that case Warner Bros. operated seven theatres in downtown Philadelphia and had all of the product of all distributors first run. Plaintiff built a theatre in the same immediate area, found to be substantially equal in all respects. He was refused pictures by every distributor, although the trial court specifically found that if his theatre had been owned by Warner's each distributor would have sold pictures to it. The Court of Appeals also found from the evidence that an agreement between distributors not to sell plaintiff was shown by necessary inference and failure of adequate denial (p. 743), and that such agreement restrained commerce.

In *Interstate Circuit v. United States* (1939), 306 U. S. 213, the agreement found to have been made by the distributors was a straightforward price-fixing agreement—namely, that they would not sell any picture to a competitor of the defendant circuit who charged less than 25¢ admission. In *Bigelow v. RKO* (1946), 327 U. S. 525, there was again a price fixing conspiracy found and the

clearance was declared to have been so arranged as to benefit the defendant distributors' own theatres.* In *Ball v. Paramount Pictures, Inc.* (3rd Cir., 1948), 169 F. 2d 317, plaintiff, an independent, took the lease of a theatre away from a company affiliated with Paramount, one the distributor defendants. Thereafter all distributors refused to give plaintiff the run the theatre had theretofore enjoyed, even though he offered substantially more money therefor than did the competing theatre which Paramount had erected in the same area. By a split decision the Circuit Court found conspiracy in violation of law.

In *Bordonaro Bros. Theatres v. Paramount Pictures* (2nd Cir., 1949), 176 F. 2d 594, the jury found favoritism of an affiliated theatre over an independent theatre which was larger and at least as favorably located. The Court of Appeals affirmed solely on the ground that there was evidence to sustain the finding of the trier of the facts.** In *Milwaukee Towne Corp. v. Loew's Inc.* (7th Cir.), 191 F. 2d 561, the tryer of the facts found that the particular clearance system had been entered into by agreement, was designed to create a monopoly in favor of theatres of the distributors, especially Fox and Warner's, and that the plan had not been abandoned. The appellate court affirmed because there was some evidence to support the finding.

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*The Court of Appeals said, with reference to the uniform pattern of runs and clearances: "We do not say that from that fact alone the court could infer an illegal conspiracy. *We think it could not do so.*" (150 F. 2d 877, 883.)

**The court said:

". . . Where more than one inference can reasonably be drawn from the proof, it is for the jury to determine the proper one." (At p. 597.)

It appears clearly, therefore, that each decision cited by appellant was based upon a finding of unreasonable and arbitrary discrimination without regard to the factors which the courts have held should be considered. On the other hand, there is a host of cases, including the most recent ones, where the method of distribution here utilized has been discussed and upheld and where the establishment of an inferior playing position for the plaintiff's theatre or the grant of clearance to his competitors has been found reasonable and not in violation of the law. In contrast to those cited by appellant, these are cases in which the facts are almost identical with those in this case.

The *Westway** and *Fanchon & Marco*** cases have already received comment. Factually, they are very close to this case and the issues are identical. Each discusses and disposes of the same legal contentions made here by appellant, and the opinions are compelling in reasoning.

In *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md., 1950), 94 Fed. Supp. 388, the court again reviewed the "system" of distribution. It found there, again upon almost identical facts as those in our present case, that the refusal of the distributors to serve plain-

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**Westway Theatre v. Twentieth Century-Fox Film Corp.*, 30 Fed. Supp. 830, affirmed on opinion below, 4th Cir., 113 F. 2d 932. The case distinguishes the *Interstate* case.

***Fanchon & Marco v. Paramount Pictures, Inc.*, C. C. H. Tr. Reg. Rep. 64,753.

tiff's new theatre was based upon the independent judgment of each of the distributors and that "the only motive actuating each of them separately was their ordinary business interests in exercising their lawful right to select their customers." (P. 391.) The cases cited here by appellants are discussed and distinguished. That decision was affirmed by the Court of Appeals, 189 F. 2d 797, 798-99, in the following language:

> "Whether a conspiracy in restraint of trade exists is a question of fact. As this Court has on numerous occasions said, we are not at liberty to disturb a finding of fact made by the District Court unless it be clearly erroneous. [Citing cases.] We find no such error in this case. A careful examination of the record fails to show any horizontal conspiracy among the distributors in selling to the larger and longer-established Walbrook Theatre in preference to the newly-established Windsor Theatre. It seems to this Court quite natural that the distributors would not be prone to substitute an unknown customer for a proven one. This Court cannot see how the preference of one exhibitor over another is, *per se*, a combination in restraint of trade. Ineed, every 'exclusive' contract has that effect. As the District Court concluded: 'There is no evidence tending to show any conspiracy or concerted action by the distributors; that is, there is no "horizontal" conspiracy in these cases. To some extent it may be said that some of the distributors have much of the time acted similarly with respect to Rosen and Goldberg; but

similarity of action under substantially like circumstances affecting each distributor is not proof of conspiracy.' "

In the very recent decision of *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* (2nd Cir., July 25, 1951), 190 F. 2d 951, one of the causes of action involved plaintiff's claim that defendant theatres in the same area were given priority of run and clearance over him by all major distributors. The lower court found for the defendants, and its finding was affirmed. Judge Hand pointed out that an inference of conspiracy "would only arise if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed. Thus there is nothing illegal in the mere fact that Dipson could not get all the pictures it wanted for the runs it wanted." (P. 960.) The court contrasts the case with the *Ball* and *Goldman* cases, relied on by appellant. The court also pointed out that *U. S. v. Paramount Pictures, Inc., supra,* did *not* hold particular clearance systems illegal, citing as authority the Second Circuit's own decision in *Fifth & Walnut v. Loew's Inc.* (1949), 176 F. 2d 587.

The *Fifth & Walnut* case was another case in which plaintiff's claim was similar to the one here advanced—namely, that other exhibitors had been given priority of run over his theatre. The lower court there charged the

jury that if each distributor had acted in accordance with its own individual business judgment uniformity of action was no evidence of a conspiracy, and the jury verdict was in favor of the defendants. That verdict was affirmed by the Court of Appeals in a strong opinion. The method of distribution was also considered and approved by the affirmance of a judgment for defendants in *Gary Theatre Co. v. Columbia Pictures Corporation* (7th Cir., 1941), 120 F. 2d 891, by a decree for defendants in *McLendon v. Loew's Inc.* (D. C. Tex., 1948), 76 Fed. Supp. 390, and by a decree denying preliminary injunction after evidence taken in *Meiselman v. Paramount Pictures, Inc.* (D. C. N. C., 1949), 86 Fed. Supp. 554, affirmed 4th Cir., 1950, 189 F. 2d 194.

The so-called "system" here involved is simply the essential method of distribution as affected by ordinary competitive factors. It is "fixed" only by the laws of economics and the effect of those factors. Appellant's relative playing position in a series of successive runs is the result of factors of his own choosing and over which he had entire control. Those factors determine his success or failure in the competition for priority of run. His complaint that the "system" makes him "non-competitive" is simply nonsense. Inevitably he competed for his playing position since that position was determined by the grossing potentiality of his theatre as compared with that of another. His fundamental complaint is that because of his own choice of location and other factors he was not able to win the competition.

III.

The Finding That None of the Respondents Fixed Appellant's Admission Prices But That Such Prices Were Fixed by Appellant in His Own Discretion Is Fully Supported by the Evidence.

There is not one iota of evidence in this record that any respondent in any fashion attempted to fix or determine appellant's admission prices. Appellant's own evidence completely disposes of any such claim. He testified that he determined his admission prices by making a trip throughout the territory and copying the admission prices posted on box offices of other theatres. [R. T. 1248.] He testified flatly that no distributor attempted at any time to fix his admission prices. [R. T. 942, 1247, 1306, 1309, 1311, 1314, 1315.] His admission price letter [Exs. 81, 115] was obviously an attempt to try to trick the distributors into some garbled statement. It did not work. Appellant never reduced his prices. He never intended to. He was just trying to manufacture evidence. What the distributors might have done if appellant had reduced his prices is entirely speculative.* The lower court refused to give any serious consideration to appellant's claim of price fixing. (Or. Op. 8.) On the evidence any such claim is not worthy of further discussion.

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*Under the *Paramount* decision his admission price was specifically one of the elements to be considered in determining clearance and priority of run. (66 Fed. Supp. 323, 341, 342, 343; 334 U. S. 131, 145.)

IV.

The Finding That There Was No Monopolization or Conspiracy to Monopolize Is Fully Supported by the Evidence.

Appellant's claim that somehow Sanborn and Edwards constituted a monopoly and that their operations in El Monte were the result of an illegal conspiracy to monopolize in which the respondent distributors joined is without any support from either evidence or inference. The court found squarely that such a claim had no merit in the facts presented, and the finding is unassailable. [R. 150, 151, 153.] These two exhibitors were competitors for public patronage in the El Monte area and not very friendly ones at that. [R. T. 87, 750.] The contention that they either individually or together constitute some sort of octopus engaged in strangling Puente by the use of "buying power" is absurd on its face. Sanborn owned only the El Monte Theatre and the small, late-playing house in Baldwin Park. As far as Edwards is concerned he bought his pictures on a theatre-by-theatre basis with different prices and terms negotiated for each theatre. As the evidence showed, he was unable on many occasions to purchase pictures from various distributors for certain theatres because the terms he offered for those theatres were not satisfactory to the distributors. [R. T. 361, 689, 1449, 1452, 1489; Ex. QQ.] He was unable to improve his clearances in any situation, as he testified. [R. T. 1715, 1716.] Furthermore, his lack of any "buying power" influence on the distributors is demonstrated by the fact

that he was forced to resort to arbitration proceedings under the consent decree to get an availability from the majors for his Tumbleweed Theatre even as favorable as 28 days after Sanborn's El Monte Theatre (as contrasted with Puente's 7 to 14) and his requests for an earlier availability were summarily refused. [R. T. 1706.] The so-called "combination" of Edwards' theatres with those of other exhibitors to which appellant continually refers (Op. Br. 5, 29, 60) was nothing more nor less than the utilization by him and the other exhibitors of a single agent for buying and booking purposes for reasons of efficiency and economy, a device which is normal in the industry among independent operators.

There is not one iota of evidence in this record that either Edwards or Sanborn did, or in fact, could, follow the practice of "combining the theatres in closed towns with competitive situations" for the purpose of exerting improper purchasing power as asserted. (Op. Br. 60-63.) There were no "master" agreements or "formula deals." The testimony was explicit that both Edwards and Sanborn purchased their pictures on a theatre-by-theatre basis with separate terms negotiated for each theatre. [R. T. 72, 74, 362, 689, 1449, 1489, 1715.] Of course, after such negotiations had been completed, some of the distributors listed the individually negotiated terms on one sheet covering all of the various theatres for convenience rather than following the practice of other distributors

of making out a separate sheet for each theatre.* But that is not a "master agreement." The latter, as referred to in *U. S. v. Griffith,* 334 U. S. 100; *Schine v. U. S., supra,* and *U. S. v. Paramount Pictures, Inc., supra,* was condemned because terms for one theatre were expressly or impliedly contingent on the terms for another or because an operator received unreasonable or discriminatory preferences in a competitive situation through the use of his ability to refuse to buy in a non-competitive situation. There was no such evidence in this case. The record shows exactly to the contrary, and the court's finding both in its opinion and in the formal finding of fact is explicit.

Appellant's "buying power" argument is not new. It was advanced in the *Westway, Dipson* and *Windsor* cases where the defendant exhibitors occupied somewhat the same position as does Edwards here. It was dismissed with the finding in each case that no such power existed for reasons similar to those here given.

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*An examination of the contracts themselves [Exs. 9A, 10A, 11A, 12A, 13A, 21A and 22A] will quickly dispose of appellant's "combination" argument. They demonstrate that *all* terms were separate for *all* theatres involved. Except for Monogram, there are no overall commitments whatsoever.

V.

The Finding That Appellant Has Not Been Damaged by Reason of the Acts of the Respondents Is Fully Supported by the Evidence.

It is appellant's contention that his failure to secure a run prior to that of El Monte inevitably damaged him. The evidence showed to the contrary, and the trial court so found. [R. 153.] Ample evidence supports the finding.

As the trial court clearly recognized (Or. Op. 10) the product which appellant really wanted was that of the major companies which Sanborn licensed for his El Monte Theatre. As far as Columbia, Republic and Monogram were concerned his own testimony is practically a concession of that fact. [R. T. 1224, 1226-29; *Cf.* Ex. DD.] He therefore had to have the product sold to the El Monte Theatre to operate at all.

Certainly in all fairness appellant could not expect the distributors to give him the product in priority to Mr. Sanborn unless he was willing to pay for that product what Mr. Sanborn paid. Had he done so, by his own testimony he would have lost large amounts of money instead of making the profit that he did. His testimony was that if he had first run he would gross about $600 in three or four days of operation [R. T. 1181], or $1,200 a week. He also testified that even in his present playing position, his cost, exclusive of film rental, was $750 per week, leaving a balance of $450 for film rental and his own salary. [R. T. 1184.] He would be required from this sum to pay rental for at least two top features and two fillers

per week. The *average* film rental paid by Sanborn's El Monte Theatre for each of the 36 leading pictures which played there and also in Puente *was slightly over $350 a picture.* (Appendix, Part D.) If appellant had grossed what he said he could gross and paid what El Monte paid, he would have suffered a loss of hundreds of dollars in every week of his operation.

In *Momand v. Universal Film Exchange* (D. C. Mass., 1947), 6 F. R. D. 409, 421, Judge Wyzanski discussed the holding of *Bigelow v. RKO,* 327 U. S. 251. He said there:

> ". . . Thus the *ratio decidendi* of the Bigelow case is that *where the evidence in an Anti-trust case is such that the discrepancy between plaintiff's earnings and a competitor's earnings* or between plaintiff's earnings in one year and another year *could be found by a jury to be entirely unexplained except by acts of defendants which are unlawful under the Anti-trust laws* THEN the jury may find defendants are the jural cause of the discrepancy, that is, of the loss."

Puente's failure to gross what the El Monte Theatre grossed is clearly due to its lack of anywhere near the grossing potential enjoyed by its competitors. Its position in the scheme of things is well shown by Exhibit PP showing that it played the picture "Pale Face" (which it got 7 days after El Monte) *ninth* in a group of twenty-three San Gabriel Valley theatres, while its percentage re-

turn, based on its gross, was *twentieth*.* That lack of grossing potential was due to the nature of the community itself, lack of accessibility, its heavy percentage of Spanish speaking inhabitants, and the other factors we have pointed out—not *solely* or even to any great extent to the timeliness of the pictures it played. (Appendix, Part B.) The testimony was that an earlier playing position, while it might increase the gross, would do so only slightly. [R. T. 1443, 1460, 1643.] Appellant was offered the opportunity to play ahead of El Monte if he would pay for it, and he declined to accept the offer. [R. T. 470, 564; Ex. S.] Had he done so, it would have ruined him. Consequently, he has suffered no damage by failing to receive that position.

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*In fact, it *grossed* on the picture only $46.00 more than El Monte paid for film rental! (*Cf.* Appendix B.)

VI.

There Was No Error in Denying Appellant a New Trial.

The question of whether a new trial should be granted is a matter of the exercise of sound discretion by the trial court, which discretion will not be upset unless it has been abused. (*Fairmont Glass Works v. Cub Fork Coal Co.* (1933), 287 U. S. 475; *Allison v. Standard Air Lines* (9th Cir., 1933), 65 F. 2d 668.) In this case we need say very little about the fact that the discretion was soundly exercised. The first ground upon which a new trial was demanded was the fact that on June 6, 1950, the Supreme Court denied a review of the final judgment in the case of *U. S. v. Paramount Pictures, Inc., supra,* and appellant argues that this fact alone should require the trial court to reopen the entire matter for a further hearing. The claim is patently without merit. All of the law established by *U. S. v. Paramount* was before the trial court at the time it gave its oral opinion in the case on October 20, 1949. The original decision of the Expediting Court (66 Fed. Supp. 323) which in and of itself passed upon all the problems here involved and remained unchanged in that respect by later developments, was filed June 11, 1946, long before appellant had ever begun construction of his theatre. The only Supreme Court opinion in the case was delivered May 14, 1948 (334 U. S. 131), within a few months after the theatre was opened. The second and final opinion of the Statutory Court was delivered July 25, 1949 (85 Fed. Supp. 881), just after the close of the evidence in this case and while the matter was being briefed. It was discussed at length in the briefs. The final decree of the Statutory Court was dated February 8, 1950, approximately three months before the

findings of fact and judgment were entered in this case. All parties conceded that the various opinions in the *Paramount* case represented the law, and they were argued at length during the trial and in the briefs. All that happened after the judgment herein was the *per curiam* refusal by the Supreme Court to again review the matter issued in June, 1950 (340 U. S. 803), and its denial of a petition for rehearing in October of the same year (340 U. S. 857).

Hence there was nothing in the *Paramount* case which was not already fully familiar to the court when it decided this case.

Appellant's argument that the case should be reopened so that the *Paramount* decree might be placed in evidence is wholly without merit for a number of equally sufficient reasons:

(1) The findings of fact and conclusions of law on which the decree was entered specifically speak as of the year 1945, which was long before appellant's theatre was ever erected. [See Findings of Fact, *U. S. v. Paramount,* C. C. H. Tr. Reg. Rep. p. 63,675.]

(2) The court refused to find that in any individual situation there were improper discriminatory practices in runs and clearances (66 Fed. Supp. 323, 342), and as above demonstrated the only "systems" of runs and clearances considered illegal were those which flouted rather than followed economic principles. The decisions are uniform that the *Paramount* decree is not evidence of the illegality of any particular individual method. *Fifth & Walnut v. Loew's, Inc., supra; Windsor v. Walbrook Amusement Co., supra;*

and *Fanchon & Marco v. Paramount Pictures, Inc., supra,* specifically so hold.

(3) The only statutory effect given a decree such as the *Paramount* decree is that of *prima facie* evidence. (15 U. S. C. A., Sec. 16.) This case had been completely tried. On appellant's evidence, the court held he had made out a *prima facie* case [R. T. 1388], but held that the respondents' evidence overcame such case. Nothing could be added by the *Paramount* decree to what appellant had already purported to establish by the testimony.

(4) As far as respondents Paramount and RKO were concerned they were not parties to the final decree, but were parties to consent decrees which specifically provided that they did not adjudicate the issues of fact in the complaint. (C. C. H. 1948 Trade Cases, Nos. 62,335, 62,377.) As far as Republic and Monogram were concerned, they were not parties in any proceeding in *U. S. v. Paramount.*

(5) In the absence of uniformity of parties defendant the decree was not admissible. (*Proper v. John Beane & Sons, Inc.,* 295 F. 2d 795 (E. D. N. Y., 1923).)

For all the foregoing reasons which we think need no further argument the court was, to say the least, justified in not granting a new trial merely because of the fact that after the judgment had been filed herein the Supreme Court denied a review in the *Paramount* case.

The other ground presented by the supplemental motion was an even more fantastic one. Appellant claimed that because there had been changes in the method of distribution of motion pictures in the particular area *after* the

judgment had been rendered herein he should be entitled to a new trial on the theory that such constituted an "admission" by the respondents that what they had theretofore done was illegal. If there were any soundness in appellant's position, there would never be an end to litigation. Of course there is no such soundness. In the first place, any evidentiary matters which occur after the trial has been finished and judgment rendered is not "newly discovered evidence" within the rule. (*Federal Practice & Procedure,* by Baron & Holtzoff, Vol. 3, page 288 (Par. 1305); *Campbell v. American Foreign S. S. Corporation* (2nd Cir., 1941), 116 F. 2d 926; *U. S. v. Branson,* 142 F. 2d 232, 235.) Evidence of a change in practices would have been no evidence whatsoever of any conspiracy in any event. This was specifically held in *Windsor Theatre Co. v. Walbrook Amusement Co.* (D. C. Md., 1950), 94 Fed. Supp. 388; affirmed (4th Cir., 1951), 189 F. 2d 797. As a matter of fact most courts even refuse to admit such evidence as to changes on the ground that such evidence in no way goes to prove that previous practices were other than wholly proper. (*Halling v. Shindler,* 145 Cal. 303, 312; *Gorman v. County of Sacramento,* 92 Cal. App. 656, 665.) Furthermore, as is shown by the Affidavit in Opposition to Motion for New Trial [R. 182] the changes had nothing whatever to do with the fact that the *Paramount* case was denied review by the Supreme Court in June, 1950, or constituted in any way any indication that the position taken by the distributors theretofore had been improper. The changes which occurred proved exactly what respondents had always contended, that rather than there being any "fixed" system, the system was in flux and affected by changing conditions. The affidavit shows that changes

occurred because of the advent into the area of three large, new drive-in theatres presenting novel problems in connection with the distribution of motion pictures and by the fact that drive-in theatres and other exhibitors requested of the various distributors the right to "bid" for the playing position, a request which had not theretofore been made.

The court's opinion denying a new trial shows clearly that as far as the salient elements of the case were concerned it was of the same opinion still. The "newly discovered evidence," both as to the action of the Supreme Court in the *U. S. v. Paramount* case and as to the alleged changes in the distribution practices after the decision in this case, certainly gave no valid ground for the granting of appellant's motion. None of appellant's cases indicate the propriety of a contrary ruling.

Conclusion.

The court's findings of fact are directly to the point. Only if they were "clearly erroneous" could they be set aside. With respect to each finding support is found in ample, substantial and credible record evidence. The court's judgment is in accord with all the decided cases, including the most recent determinations upon parallel facts. It should be affirmed.

Respectfully submitted,

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APPENDIX.

PART A.

Factual Errors Appearing in Appellant's Opening Brief.

1. P. 5, line 3: Edwards "operated or controlled the licensing of film for from 30 to 45 theatres in Los Angeles County." (See also p. 16, line 7; p. 19, line 11; p. 60, line 9.)

> Edwards operated or controlled about 17 theatres. [R. T. 49; *Cf.*, R. T. 51-53.]

2. P. 5, line 5: Edwards "regularly licensed pictures in a single contract for showing in from 20 to 30 of such controlled theatres."

> The documents [Exs. 9A, 10A, 11A, 12A, 13A, 21A, 22A] show the agreements were separate for each theatre involved. Most of them specifically so state, *e. g.,* Fox, "If two or more features are licensed herein for two or more theatres named herein it is simply for convenience, and this application is a separate application for each picture for each theatre. The rules of this company (1) require the license for each feature to be separately negotiated for each theatre . . . and (3) forbid the conditioning of one license on another." [Ex. 21A.]

3. P. 6, line 16: "Of the theatres above-named [9 theatres] the Puente Theatre is superior to all except the El Monte Theatre [Ex. Z; F. F. VI]." P. 36, line 24; p. 37, line 3: ". . . the court found . . . that the Puente Theatre was the newest and most modern theatre

in the area and was superior to all such theatres excepting only the El Monte Theatre."

There was no such evidence or finding. The court found with respect to appellant's theatre "as to its physical appointments, in comparison with *the three theatres* with which it is in substantial competition, it is exceeded in superiority only by the El Monte Theatre." [R. 148.] The "three theatres" were the Valley, El Monte, and Tumbleweed. [R. 140.]

4. P. 10, line 19: "All three of these theatres . . . had enjoyed a fixed playing position of 14 days after first run closing in Pasadena."

On product played by Sanborn, Edwards' playing position in the El Monte area was "fixed" at 28 days after the El Monte Theatre by the arbitration decree. [R. T. 1706; *cf.* 641, 643, 1538.]

5. P. 10, line 14: ". . . Edwards . . . demanded . . . a protective clearance in favor of the small Valley Theatre, in El Monte . . ." (See also p. 11, line 3.)

Edwards asked a clearance in favor of his "El Monte situation" which consisted of the Valley and Tumbleweed Theatres. [Ex. 3.]

6. P. 10, line 25: ". . . Southern California Amusement Co., Inc. (the licensing agent for all Edwards Theatres and other theatres in the area) . . ." (See also p. 60, line 22.)

There is no evidence that any theatre "in the area" other than the "Edwards Theatres" was represented by this company.

7. P. 11, lines 17-23: Appellant states that the respective distributors had "restricted" their product to the Sanborn theatres as regards those distributors licensing him and the Edwards theatres as regards those distributors licensing them.

There was no "restriction." The reason why Sanborn was able to buy the major product and Edwards had to rely on the product of the minors are disclosed in our brief. [See also attempts of minor distributors to sell Sanborn; R. T. 102-03, 199; *Cf.* 597, 750, 1705, 1771-74.]

8. P. 13, line 21: "Columbia, Universal and other distributors stated flatly that the playing position awarded to plaintiffs by these companies would be the same as the position awarded to him by their competitors. [R. T. 909, 916.]"

This is *appellant's* testimony as to what the *Universal* representative told him. Such statement was denied by that representative. [R. T. 1837; *cf.* R. T. 1831-34.] The testimony of the other distributors shows no such statement was made by any of them. [R. T. 295-96, 394, 397, 531, 584-85, 587, 593, 1142, 1150, 1583, 1607, 1757, 1806, 1824, 1837.]

9. P. 13, line 24: "The above testimony clearly establishes without substantial dispute the following facts" followed by two pages of items.

Neither the "above testimony" or any testimony in the case "establishes" such "facts," as is demonstrated in our brief. Appellant proposes to prove conspiracy by his own *ipse dixit.*

10. P. 15, line 16: "The statement attributed to Mr. Carmichael of Republic at R. T. 930 to the effect that Republic could give no better playing position than was given by other distributors . . . is typical of the response of many, if not all, of the distributors contacted by plaintiffs prior to the opening of the Puente Theatre."

The statement is, of course, "attributed" by appellant himself and is denied by Carmichael. [R. T. 1803-06, 1808, 1814.] Republic, as one of the weakest companies, was prepared to meet competition. [R. T. 1817.] Appellant gives no record reference to statements by other distributors and their testimony discloses no such statements.

11. P. 15, line 22: Appellant refers to the "absolute admission of defense counsel . . . in regard to the fixed noncompetitive nature of the pattern of distribution, contained in R. T. 350."

The "admission" was a statement to the effect that clearance is given to protect the prior licensee, which is exactly what is declared to be legal and essential by the Expediting Court in *U. S. v. Paramount Pictures, Inc.*, 66 F. Supp. 323, and by the United States Supreme Court in the same case, 334 U. S. 131, and in *Schine Theatres v. U. S.*, 334 U. S. 110.

12. P. 17, line 20: "Collins of Republic testified that plaintiffs had never been given right to compete."

No record reference is given, and we are positive that there is no such testimony.

13. P. 18, line 20: "From February 20, 1948, to March 31, 1949, Puente paid Monogram a total rental of $630.52 for last run privileges compared to the rentals of the protected Valley Theatre of only $437.50 for a first and protected run."

Appellant gives no intelligible record reference for his figures. Monogram's cut-off cards [Exs. 170, 172] show Puente paid $678.02 for 28 pictures (including "The Babe Ruth Story," $118.02); Valley paid $626.50 for 22 pictures. Valley paid more to Monogram for every picture played than did Puente. Excluding "The Babe Ruth Story" the average per picture for Puente was $20.09, for Valley $28.50. The price indicates the quality of the pictures.

14. P. 30, line 4: ". . . the playing position of each said theatre was made dependent not upon the playing of a picture in a directly competing theatre in the immediate area, but upon the exhibition of pictures in Pasadena and Alhambra . . . each enjoyed a playing position independent of and free from the control of any immediately competitive theatre."

The theatres within the Alhambra orbit were subject to a clearance in favor of the Alhambra theatres. The theatres in the Pasadena orbit were subject to a clearance in favor of Pasadena. Temple City was subject to a clearance in favor of San Gabriel which itself was subject to a clearance in favor of Alhambra. Similarly Puente was subject to a clearance in favor of the El Monte theatres, which were themselves subject to a clearance in favor of Pasadena. All were treated alike.

15. P. 31, line 11: "The intent of *Warners and Paramount* is further established by the testimony of the witness Greenburg . . . and by . . . letter . . . to Paramount Pictures from the defendant Sanborn."

Aside from the fact that the testimony quoted does not tend to prove what appellant says it does, it could not possibly affect Paramount since Greenburg was an official of Warner's and the testimony concerned only the manner in which *Warner's* distributed its pictures.

16. P. 32, line 18: "Mr. Cohen of RKO admitted in response to the court's questions that . . . had the Puente Theatre been owned by Edwards, no protective clearance would have been set up. [R. T. 353-354.]"

Mr. Cohen testified *exactly to the contrary.* We quote [R. T. 354-55]:

"The Court: In other words, if Mr. Edwards owned the Puente Theatre you wouldn't be interested in the clearance, would you?

. . .

The Witness: I would be interested in clearance, yes.

The Court: But you would let Mr. Edwards arrange the clearance himself, would you not?

The Witness: No, I wouldn't, because I don't think Puente could return as much money to me as either Tumbleweed or El Monte could."

17. P. 34, line 21: "Being denied all pictures until the protected Valley Theatre and all other theatres in the area had played them Puente nevertheless *did in fact* pay total film rentals during the period of $18,860 for a non-competitive last run in the entire area."

(1) Practically the only pictures playing the Valley ahead of Puente were those of RKO, Columbia, Monogram and Republic. (2) Puente played ahead of many theatres on many top pictures and paid less [see Br. p. 43 and Ex. PP]. (3) Appellant's figure includes $5,114.19 paid for Spanish pictures to non-defendant distributors.

18. P. 35, line 1: "This amount was more than was paid by any theatre in that area for first-run privileges . . ."

In what area? Appellant uses the word "area" to suit his purpose. If he means to include in the "area" the theatres he lists on page 7 of his brief his statement is entirely erroneous, as the evidence showed that Monterey Park, Rosemead and El Monte paid more, Covina paid substantially more on pictures distributed by the respondents, and there was no evidence as to either the Garvey or Azusa theatres. Our within brief demonstrates the misleading nature of appellant's figures.

19. P. 46, line 19: "The court further found in the *Goldman* case that the first run theatres then enjoying the monopoly were superior to plaintiffs' . . . Theatre."

The court found that plaintiff's theatre was larger than some of the Warner's theatres; that "its appointments are quite as elegant as any of the Warner's

theatres"; that it was located with one block of an important Warner's theatre; that its inability to obtain product "was not based on its lack of fitness"; that it offered more money for the pictures, and that "if it had been a Warner's theatre they would have leased plaintiff the pictures it sought." (150 F. 2d 738, 742.)

20. P. 49, line 20: ". . . as admitted and affirmatively stated by defendants, there is an actual surplus of film."

No reference is given. In fact, while Columbia testified it had no print shortage [R. T. 303] other distributors testified that there was a very acute shortage of prints during the time when pictures became "available" to appellant. [R. T. 197, 229, 609.]

21. P. 66, line 18: ". . . by comparing the grosses of the Tumbleweed Theatre (which the Court held to be comparable to the Puente Theatre) of $79,207.95, to those of the Puente Theatre of $56,669.51, an adjustment of rentals would appear to be in favor of the latter theatre since it paid much higher gross rentals for stale pictures on a non-competitive run than did the Tumbleweed Theatre for first and non-discriminatory exhibition rights in the competitive area."

(1) The court did not hold the Tumbleweed "comparable" except as to physical appointments. To the contrary as to location and accessibility it was held superior. (Or. Op. 12, 13, 15.)

(2) The figures for Puente's grosses includes grosses of Spanish pictures, not here involved, which amounted to about $10,000. [Ex. DD, Br. p. 47];

(3) The Tumbleweed paid about 100% more in gross rentals on pictures it played ahead of Puente than did Puente on the same pictures. (Br. p. 50.)

22. P. 68, line 1: "This reformation in the former fixed system occurred immediately subsequent to the final affirmation of the Findings, Conclusions and Decision of the Expediting Court in the *Paramount* case . . ." (See also p. 75, line 25: "The condemned system began to be abandoned only after June 5, 1950—".)

Respondents' affidavit shows that the statement is entirely false. Most of the changes occurred long before the final action in *U. S. v. Paramount* and that action had no effect thereon. [R. 183, lines 10, 17; 184, lines 6, 11; 195, lines 1, 5, 9, 20; 186, line 1.]

23. P. 68, line 6: "In response to the latter motion, defendants filed their counter affidavit *admitting* the basic facts so alleged."

The court can determine the incorrectness of this statement by merely reading the affidavit in R. 182-89.

24. P. 68, line 18: ". . . it would seem that . . . the trial court had determined to reverse its original judgment regarding its basic holdings on conspiracy . . ."

The trial court said "I have concluded that I could not in good conscience change my original findings on conspiracy. With all the arguments of counsel and his affidavits of subsequent events I still hold to my original conclusion." [R. 190.]

25. P. 77, line 11: "Only two replies to plaintiff's written request were received . . ."

Four replies were admittedly received, three in writing [RKO, Ex. 84, Loew's, Ex. 115, and Fox, Ex. 162] and one orally. [Paramount, R. T. 1315.]

26. P. 79, line 13: ". . . the trial court's conclusions during the actual course of the trial were contrary to the ultimate holdings of the court arrived at approximately 18 months after the actual trial of the case . . ."

The taking of evidence ended May 24, 1949. The findings made herein accurately express the court's decision given from the bench October 20, 1949, after the evidence had been compiled and reviewed by both parties in comprehensive briefs. (Or. Op.)

PART B.

'able Showing 26 pictures grossing largest amounts in Puente Theatre from opening of theatre to time of trial, exclusive of Tuesday or Saturday programs. Data Compiled from Defts. Exs. N, O, P, Q, T, V, W, X, DD, HH, KK, and Plaintiff's Exs. 34, 44, 59, 89, 105, 120, 139, 155, 172, 176.

'rder	Picture	Dist.	Units Played	Gross	Days played after close in El Monte
1.	Red River	U-A	3	$ 504.68	Ahead
2.	Command Decision	Loew's	4	481.26	Ahead
3.	Road to Rio	Par.	4	458.84	12 days
4.	Snake Pit	Fox	4	452.14	18
5.	Pale Face	Par.	3	449.00	7
6.	Three Musketeers	Loew's	4	440.02	17
7.	Johnny Belinda	W.B.	3	416.86	30
8.	Gone With Wind	Loew's	3	410.08	Ahead (Reissue)
9.	Emperor Waltz	Par.	4	385.64	21
10.	Body and Soul	U-A	3	373.44	Ahead
11.	Babe Ruth Story	Mono.	4	371.04	Ahead
12.	When My Baby Smiles	Fox	4	370.14	26
13.	Hills of Home	Loew's	4	368.74	7
14.	Bambi	RKO	3	359.32	17
15.	Julia Misbehaves	Loew's	4	353.20	Ahead
16.	Loves of Carmen	Col.	4	348.66	85
17.	Gentlemen's Agreement	Fox	4	341.26	18
18.	Words and Music	Loew's	4	335.44	Ahead
19.	Mother Wore Tights	Fox	4	334.04	18 months
20.	Saigon	Par.	4	328.92	7 days
21.	Green Grass of Wyoming	Fox	4	326.20	21
22.	Good News	Loew's	4	325.40	48
23.	Captain From Castile	Fox	4	324.78	11
24.	Wild Irish Rose	W.B.	4	324.02	11
25.	Southern Yankee	Loew's	4	318.58	35
26.	Call Northside 777	Fox	3	317.64	0
	Total Units and Gross		97	$9,819.34	

'OTE 1: List does not include Puente opening (Picture: "Wild Harvest"; Gross $417.22); nor the Armistice Day American Legion Stage and Screen Show (Picture: "Good Sam"; Gross $485.54), since such grosses have little to do with the picture showing and are hence misleading.

OTE 2: The word "Ahead" means either that Puente played before the El Monte theatres or that none of the El Monte theatres played the picture.

'OTE 3: "Call Northside 777" played immediately following El Monte close.

PART C.

Average per picture film rentals paid by theatres to each distributor during period covered by Exhibits N, O, P, Q, T, V, W X, HH, and KK.

Average based on all films shown. Figures in parentheses show number of pictures played.

1.

Distributor	Puente Theatre		El Monte Theatre	
Fox	(36)	$46.05	(33)	$183.55
Loew's	(28)	71.16	(27)	275.71
Paramount	(25)	49.97	(25)	222.03
Warner's	(16)	55.62	(14)	241.60
Universal	(14)	38.32	(13)	183.07
United Artists	(14)	39.53	(8)	119.38
	(133)	$51.34	(120)	$214.74

2.

Distributor	Puente Theatre		Valley Theatre		Tumbleweed Theatre		Combined Valley-Tumbleweed
RKO	(36)	$42.66	(29)	$90.27	(28)	$116.95	$207.22
Columbia	(59)	28.67	(49)	44.12	(54)	44.73	88.85
Republic	(25)	17.80	(11)	26.36	(14)	30.36	56.72
Monogram	(38)	21.59	(35)	25.30	(37)	28.20	53.50
Total Averaged	(158)	$28.43	(124)	$48.03	(133)	$53.83	$101.86

PART D.

Table showing comparison Puente gross and film rental with rentals paid by El Monte Theatre on 36 leading pictures from Loew's, Paramount, Fox and Warner's, which played both theatres, El Monte ahead of Puente, up to date of complaint. Data Complied from Defts. Exs. Q, T, W, X.

Picture	Puente Gross	Puente Film Rental	El Monte Theatre Film Rental
Loew's			
Good News	$ 325.40	$ 108.64	$ 265.00
Green Dolphin Street	300.20	120.08	503.78
Cass Timberlane	268.36	107.34	527.47
3 Daring Daughters	305.90	62.50	300.00
Bride Goes Wild	284.50	62.50	300.00
State of Union	220.32	88.13	345.18
The Pirate	275.86	62.50	300.00
Home Coming	244.84	87.94	576.45
On an Island With You	269.28	110.00	187.84
Easter Parade	239.66	110.00	290.48
Date With Judy	271.16	143.00	292.47
Southern Yankee	318.58	62.50	300.00
Julia Misbehaves	353.20	110.00	255.73
Three Musketeers	440.02	110.00	439.84
Paramount			
Road to Rio	458.54	183.54	357.59
Albuquerque	287.72	35.00	250.00
Saigon	328.92	50.00	350.00
Big Clock	210.62	50.00	350.00
Emperor Waltz	385.64	148.26	400.24
Foreign Affair	178.10	65.00	350.00
Unconquered	292.66	110.06	505.51
Beyond Glory	309.86	65.00	350.00
Sorry Wrong Number	243.04	50.00	350.00
Twentieth Century-Fox			
Daisy Kenyon	247.90	61.97	300.00
Captain from Castile	324.78	129.91	454.40
Northside 777	317.64	119.06	343.13
Gentlemen's Agreement	341.26	129.50	358.78
Iron Curtain	236.48	72.27	325.00
Green Grass of Wyoming	326.20	73.10	300.00
Apartment for Peggy	275.84	60.00	356.28
Warner Bros.			
Wild Irish Rose	324.02	129.61	427.20
Sierra Madre	296.16	90.00	385.38
Voice of Turtle	224.10	75.00	328.93
Key Largo	290.82	110.33	390.88
Silver River	266.76	75.00	300.00
Romance on High Seas	203.78	75.00	300.00
TOTAL	$10,488.12	$3,243.74	$12,717.56